No. 20,920

IN THE

United States Court of Appeals

For the Ninth Circuit

CHINA UNION LINES, LTD.,
a corporation,
Appellant,

vs.

STATES STEAMSHIP COMPANY,
a corporation,
Appellee.

OPENING BRIEF FOR APPELLANT CHINA UNION LINES, LTD.

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This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree entered in the United States District Court for the Northern District of California, Southern Division, the Honorable George B. Harris presiding, in favor of libelant, STATES STEAMSHIP COMPANY (Appellee herein) (hereinafter called STATES STEAMSHIP) against respondent, CHINA UNION LINES, LTD. (Appellant herein), and SS UNION STAR (hereinafter respectively called CHINA UNION and UNION STAR).

JURISDICTION

This cause was begun on the admiralty side of the District Court by libel *in rem* and *in personam* filed by STATES STEAMSHIP COMPANY as owners of the vessel SS ILLINOIS against the vessel SS UNION STAR and her owner CHINA UNION LINES, LTD., for damage suffered by the vessel, the ILLINOIS, in collision with the UNION STAR on August 26, 1960 (R.3-6). CHINA UNION LINES, LTD., filed a claim (R.7) and answer (R.9-13) together with a cross libel (R.14-20).

The cause was tried to the Honorable George B. Harris on May 18 and 19, and June 21, 1965. On November 9, 1965, the District Court filed its Order for Decree (R. 86-87) following which the District Court filed its Findings of Fact and Conclusions of Law (R.88-93) on November 29, 1965, as amended by a letter dated November 26, 1965, from attorneys for Appellant to Honorable George B. Harris (R.94). The Final Decree holding STATES STEAMSHIP and CHINA UNION equally at fault and entitling STATES STEAMSHIP to recover one-half of such damages from CHINA UNION was filed November 29, 1965, and entered December 1, 1965 (R. 95-96). Within 90 days thereafter, on February 18, 1966, CHINA UNION LINES filed its notice of appeal (R.99), and Cost Bond on appeal (R.112).

Jurisdiction of this admiralty matter was vested in the District Court under Article III, Sec. 2, of the United States Constitution and 28 U.S.C. 1333 (1).

Jurisdiction of this Honorable Court of Appeals exists under 28 U.S.C. 41, 1291, 1294, and 2107, Notice of Appeal having been filed within 90 days from entry of the Final Decree (R.99).

Jurisdiction of this Court also lies pursuant to Article III, Section 2, of the United States Constitution by reason of questions herein relating to the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946 [November 30, 1948], T.I.A.S. No. 1871 and the Merchant Marine Act of 1936, 46 U.S.C.A. 1171 et seq.

STATEMENT OF THE CASE

In the preceding jurisdictional statement we have referred briefly to the nature of the proceedings and the pleadings that brought the case before the District Court.

In order that this Court may have a clear understanding of the questions that are involved in this appeal, we will review the main facts relative to the collision, as adduced from the testimony of the principal witnesses on both sides.

The collision occurred at about 11:43 A.M. on August 26, 1960, in the mouth of the Saigon River, approximately one mile from shore in the Baie des Cocotiers (Coconut Tree Bay) and off the town of Cape St. Jacques, South Viet Nam (Record 78). The navigable river channel in this area is approximately a half-mile wide at its narrowest point.

The UNION STAR is a Republic of China motor vessel about 328 feet long, with a 50-foot beam, of 3,705 gross tons and was powered by a 1,700 horsepower diesel engine turning a single screw. Her normal full speed, loaded, was about 10.2 knots. On the day of the collision, just prior to its occurrence, she was proceeding upstream from

the sea toward Saigon, piloted by Pilot Phan-Van-Dy, a duly licensed and qualified Saigon River pilot (Record 77). The UNION STAR was heavily loaded with sugar and her draft on departure from her prior port-of-call, Kaohsiung, Taiwan, was 20 feet, 5 inches forward and 21 feet, 4 inches aft.

In addition to Pilot Dy, Captain S. D. Hu, the Master of the UNION STAR, the Third Mate of the UNION STAR, and a quartermaster were on the bridge of the UNION STAR (Tr 251:16). On the forecastle head were the Chief Officer, the boatswain, the carpenter and a few seamen (Tr 251:12). There was a telephone between the forecastle and the bridge for the lookout to make reports (Tr 251:3,4). The usual engineering staff were on duty in the engine room and performed their duties in the proper manner.

The ILLINOIS is a steel steam turbine-driven vessel about 455 feet long of 7,640 gross tons. Her normal full speed loaded was a little in excess of 12 knots. At the time of collision, she was proceeding out of the Saigon River towards Koh-si-chang, Thailand. The ILLINOIS had left Saigon shortly before for the trip down the River under the command of Saigon River Pilot Phan Huu Hai with a light load and was drawing 16 feet, 10 inches (Record 77).

The watch on deck on the ILLINOIS at the time of the collision consisted of but two officers, the Master and the Junior Third Officer, and the man at the wheel (Tr 139:20, 24). There was no lookout on the bow nor anyone on the forecastle (Tr 140:6-10). The pilot, Hai, had left the bridge approximately five minutes earlier.

The UNION STAR had arrived at the entrance to the Saigon River early in the morning of the day of collision and anchored to the right of the channel to await the pilot (Tr 228:2,18-19). The actual position of anchorage, ascertained by cross-bearings, was about one and two-tenths miles due west of the light house on Nui Vang Tau, the coordinates of which position were latitude 10° 20 minutes north, longitude 170° 03.1 minutes east (Tr 228:4-12; 202:4-14). (See the chart attached hereto as Appendix B for this and other relevant positions.) Witnesses of the ILLINOIS dispute this anchorage position. However, this position is verified by a disinterested witness, Phan Huu Hai.

The ILLINOIS' pilot, Phan Huu Hai, testified that the UNION STAR was anchored upstream from the Kontum Buoy but downstream from the Korhyu Buoy (Tr 35:24, 25) and a little to the west of a line between these two buoys (R. 53: No. 45).

The pilot for the UNION STAR, Phan Van Dy, came aboard the UNION STAR about 11:22 A.M. (UNION STAR Log, Ex. N) and at 11:26 the UNION STAR commenced heaving in her starboard anchor (UNION STAR Log, Ex. N). Some fifteen minutes later, at about 11:36½ (UNION STAR Log, Ex. N), the anchor was finally free of the bottom and the vessel underway (Tr 203:7). As soon as the anchor was free of the bottom, a seaman in the bow untied the line which was attached to the anchor ball and lowered it onto the forecastle deck (Tr. 204:7-9).

Pilot Hai had seen the ILLINOIS before boarding the UNION STAR and made note of it again while ascending to the bridge of the UNION STAR with the Captain at

about 11:20 A.M. (Tr 204:25). At that time, the UNION STAR was heading visibly north-northwest (Tr 205:8).[1] The ILLINOIS was then located approximately one point off the port bow of the UNION STAR and some 2,000 meters distant (Tr 205:9).

The testimony of Pilot Dy concerning the position of the ILLINOIS is verified by all testimony of the ILLINOIS and her Pilot relating to the movement of the ILLINOIS down the Saigon River at that time. At that time, she was heading due south at approximately 13 knots on course 180° in the section of the channel between the Kumigawa Buoy west of Point Vung and Cape Eperon (Tr 31:1-24). The ILLINOIS continued on this southerly course until she reached Cape Eperon. She then changed course to the southeast (150°) and reduced speed to 6 knots to approach the pilot station in Coconut Tree Bay (Tr 32:1-9). About two minutes later, the ILLINOIS changed course further to the east (145°) and stopped engines to come to a position for disembarkation of the Pilot Hai (Tr 32:24; 33:12). When the ILLINOIS eventually came to rest at 11:35 (Tr 150:13), she was located approximately 400 meters to the northwest of the

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[1]Counsel for Appellee has previously placed great stress on this heading and on the words north-northwest as being a statement of the exact compass heading of the UNION STAR. While the term north-northwest can mean a particular exact compass heading, this does not seem to be Pilot Dy's inference here. The French word he used is "sensiblement" which was translated in the English version of the Pilot's statement as "obviously." However, a better word would be "visibly" as "sensible" and "sensiblement" have the general connotation of information sensed or perceived, i.e., a general estimate rather than an exact statement. Hence we have used the term "visibly" instead of "obviously" to correct what appears to be a misinterpretation of the Pilot's meaning.

Korhyu Wreck Buoy (which was, at the time of the collision, in a position to the southwest of and close to the western edge of the wreck). In that position, the bridge of the ILLINOIS was just "a shade to the west of the exit range line," i.e., about 100 feet (Tr 119:4-13).

Thus the ILLINOIS eventually stopped dead in the water about 11:35, shortly before the UNION STAR finally freed her anchor from the bottom and got underway. Pilot Hai then went into the chart house with Captain Sorensen, the Master of the ILLINOIS, to point out to Captain Sorensen the safe course for departure from the Saigon River. Inasmuch as the sea buoy (the London Maru Buoy) had washed away in a recent storm, Pilot Hai told Captain Sorensen that he should follow a special range in order to maintain the proper exit course (Tr 42:25; 43:1-4). This range was established by aligning the shore line at Point Vung with the peak of a mountain called Nui Ba Lai approximately eight miles to the north. If these two points were kept in alignment, the vessel would proceed on course 182° and safely exit the river (Tr 34:1-23). It probably took no more than a couple of minutes for Pilot Hai to point out the range line and land marks to Captain Sorensen, since he had made many passages in the Saigon River. So, at about 11:37, Pilot Hai started to leave the bridge of the ILLINOIS. Before leaving the bridge, Pilot Hai glanced toward the UNION STAR, which had just freed its anchor from the bottom a few seconds before. Apparently the seaman on the UNION STAR was still untieing the line to the anchor ball as Pilot Hai says he saw the anchor ball still up before he turned to go below (Tr 43:19). He

also noticed that the ILLINOIS was still on a heading of 145° as he left the bridge (Tr 39:20-25). Pilot Hai then went below alone. He disembarked into his pilot boat a couple minutes later at 11:39 (Tr 106:4-6) from the port side of the ILLINOIS (Tr 119:23-25). It probably was another half minute or more before the pilot boat cleared the ILLINOIS so that it was safe for her to maneuver.

While Captain Sorensen was leaning over the port rail of the ILLINOIS bridge watching the approach of the pilot boat and the disembarkation of Pilot Hai, the UNION STAR was hauling down its anchor ball, heaving in on its anchor chain and starting to move forward. Her engines were put on full ahead at 11:37 (UNION STAR Engine Room Log, Ex. M) and her helmsman was ordered to steer course 348° (Tr 207:15) which was the UNION STAR's heading when she got underway (Tr 266:17-25; 267:1-6). The UNION STAR maintained this anchored heading upriver because the tide was slack and the outflow of the river kept the vessel turned upstream (Exhibit H—Hydrographic Office Publication No. 125, pp. 146-147). The 348° heading was maintained once movement commenced because it would have passed close to the Korhyu Wreck Buoy and along the far right of the river entrance toward the fairway of the river channel.[2]

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[2]Counsel for Appellee has previously attempted to raise an inference that the UNION STAR was intending to follow the previously mentioned exit range up the river. The purpose for this attempt is clear as a basis for giving reason to the ILLINOIS story that the UNION STAR directed itself toward the ILLINOIS. Examination of the range line on the chart reveals, however, that following such a range upriver would merely lead a vessel into the shoals of False Bay. Furthermore, in the clear visibility, a course set to a point just east of the Kumigawa Buoy would be both the safest and most direct.

This course was chosen so that the UNION STAR would at all times be to the right of the 182° exit range line to a point at least a mile beyond the anchorage and thus in no way constrict the maneuvers of the ILLINOIS in coming to the 182° exit range (Tr 208:12-17).[3]

The UNION STAR proceeded full ahead on course 348° for approximately three minutes. During this time, the vessel traveled approximately three-tenths of a mile and reached a point some 200 meters to the south-southwest of the Korhyu Wreck Buoy. If UNION STAR had not been forced to alter its course, because of the movements of the ILLINOIS, the UNION STAR would have passed the Korhyu Wreck Buoy at about 100 meters distance on the starboard beam (Tr 209:21-25; 210:1-6). This would have brought the UNION STAR across the exit range a considerable distance upstream of the position of the

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[3]The translation of Pilot Dy's statement needs some clarification on this point. The referenced translation in the record reads "the UNION STAR would be at all times to the right of the 002 degree range on a line of more than a nautical mile. . . ." This could be interpreted as meaning that the UNION STAR would at all times be more than one mile east of the 002 degree range line during its movement upriver. A cursory examination of the chart will indicate that a course one mile to the east of the mentioned exit range would always be at least in the shallows, if not ashore. Hence, the referenced translation of the French ". . . l'UNION STAR serait tout le temps à droit de l'alignement au 002° sur un parcours de plus d'un mille marin. . . ." seems questionable. The word "parcours" has several meanings including "line," "way" and "distance." It would seem that a more compatible and proper translation for the phrase might be "the UNION STAR would be at all times to the right of the 002 degree range line for a distance of more than a nautical mile." Examination of the chart will indicate that on course 348° from anchorage, the UNION STAR could have traveled about one nautical mile before it would have crossed the exit range line upriver from the position of the ILLINOIS when dropping her pilot.

ILLINOIS, even if the ILLINOIS had not moved from the position where the pilot was disembarking.

At about 11:40, since the ILLINOIS had not yet turned to leave the pilot station, Pilot Dy changed course slightly further to the east (course 353°) in order to pass the Korhyu Wreck Buoy as closely as possible and provide the utmost maneuvering room for the ILLINOIS turn (Tr 210:7-13). When this course change was made, the UNION STAR sounded one short blast on her whistle (Tr 239:12-17). At the same time, the engines of the UNION STAR were put on stop (Tr 239:21; UNION STAR Engine Room Bell Book, Ex. M).

The ILLINOIS, during this whole period, remained heading approximately southeast (145°). While on this continued southeasterly heading, then, sometime after 11:40, the ILLINOIS gave two blasts on its whistle (Tr 284:17-20). Shortly after the pilot launch left the side of the ILLINOIS and became visible to the personnel in the UNION STAR, the ILLINOIS' propeller could be seen throwing up large amounts of water and thus indicating that the screw of the ILLINOIS was turning rapidly (Tr 211:15-18). The ILLINOIS started moving ahead slightly on a course of approximately 145° (Tr 211:21,23; 212:4-10). At about the same time, the ILLINOIS blew two short blasts of its whistle and started a gradual turn to the left, cutting across the range line almost perpendicularly and threatening to cut across the course of the UNION STAR (Tr 213:2-8). The UNION STAR could not turn to the west without increasing the angle of meeting of the two vessels. Thus, the UNION STAR rudder was ordered hard right and the engines put full astern to

try to bring the vessels parallel (Tr 213:12-24). The vessels hit shortly thereafter at 11:43 (UNION STAR Log, Ex. N).

After the collision, the vessels maneuvered to separate and anchored. The captain of the UNION STAR investigated his damage and then boarded the ILLINOIS at about 1:00 P.M. to present his protest accompanied by Pilot Dy (UNION STAR Log, Ex. N). At 1:28, the UNION STAR then weighed anchor to proceed to Saigon before the flood tide ended (UNION STAR Log, Ex. N).

THE NAVIGATION OF THE ILLINOIS

The foregoing constitutes the Statement of the Case from the point of view of the UNION STAR. We should also examine the events as related by the ILLINOIS. In so doing, we find that this case presents a rather unusual situation. The maneuver of the ILLINOIS was so aberrant that it is immediately assumed by one first hearing the facts that such acts could not have happened. It is most unusual for a vessel to swerve across the course of another and to head for shore. Thus there is an initial tendency to think that the ILLINOIS' story is the only plausible one. However, we think that the flaws in the story of the Captain of the ILLINOIS will become apparent when examined in detail.

Captain Sorensen's story, while seemingly plausible, has serious defects of consistency and physical capability.

The fairest method of weighing the ILLINOIS version of the facts is to attempt to tell it in a narrative fashion, just as the statement of the case above.

We have one problem in this endeavor: The witnesses of the ILLINOIS are far from consistent and their facts are often at variance among themselves. Also, only one witness for the ILLINOIS was on the bridge at the time of the collision. We have only the testimony of Captain Sorensen, Master of the ILLINOIS, from which to glean the details of the navigation of the ILLINOIS and the exact positions of the vessels. Other witnesses could testify only to relative bearings unrelated to a heading for their own vessel. Thus, we are forced to adopt essentially the story of Captain Sorensen for the ILLINOIS version of the events.

Reverting back to the previous discussion of the facts of the case, it will be recalled that the ILLINOIS' pilot, Pilot Hai, left the ship's bridge at about 11:37. Pilot Hai noted at that time that the ILLINOIS was still on a heading of 145° (Tr 39:24).[4] Captain Sorensen says that after the pilot left the bridge at 11:37 and before he gave his first helm or engine order, the ILLINOIS was heading between 180° and 185° (Tr 116:7-11). He accounts for this rapid swing on the basis of winds and currents (Tr 116:25; 117:1,2 and 20). In this regard, we might point out that Pilot Hai noted that the current was toward the south, but very weak (speed of one-half knot) (Tr 39:18), and there was a light breeze from the southwest (Tr 39:3).

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[4]Counsel for Appellee has claimed that this answer is not responsive to the question in giving a course rather than a heading. However, this is merely a problem of translation. The French word used by Pilot Hai is "cap" or "head" rather than the word "route" which is the proper French for "course." Hence Pilot Hai has here responded as to the ILLINOIS' heading at the time he left the bridge, not as to the course previously followed.

After the ILLINOIS had spun around some 40 degrees in the three-minute interval, and the pilot had left the side of the ship, Captain Sorensen had the engines put ahead full. Since his vessel was slightly to the left of the exit range line and almost parallel to it, he ordered left rudder to come over onto the exit range (Tr 121:11). The vessel moved swiftly because by the time the Captain had reached the port wing of the bridge, the ship was right on the range line (Tr 212:16). The Captain then steadied the ILLINOIS on this line, on course 182° (Tr 122:1-9). At that moment, Captain Sorensen heard the whistle of the UNION STAR (Tr 122:9-11). He walked toward the starboard wing of the bridge (i.e., the side facing away from the near shore of the Bay of Coconut Trees) (Tr 122:22-25) and saw the UNION STAR some 300 to 400 feet (less than a ship length) away (Tr 128: 1-9) heading east (Tr 123:22-24) and apparently cutting across the entrance to Saigon River, heading for the shoals.

Captain Sorensen ordered the engines stopped at 11:41 (Tr 124:1-6). Then 15 seconds later, full astern (Tr 124: 7-9), then 15 seconds after that, full ahead and hard left rudder (Tr 124:23-24). Thirty seconds after that, the order full astern was given (Tr 126:23-25; 127:1-2). Then after another thirty seconds stop engines (Tr 127: 7). The collision then occurred with the vessels parallel at that moment (Tr 127:8-11).

There are several serious flaws in the story presented by Captain Sorensen:

(1) It is alleged that the ILLINOIS lay dead in the water and spun around at the rate of 13 degrees

per minute for three minutes while the UNION STAR was anchored, heading northwest without any radical swings for over ten minutes less than a mile away.

It is, of course, not impossible for a vessel to suddenly spin around quite rapidly in a short time. However, when other vessels in similar circumstances in the near vicinity are not so affected by the current, such alleged swings take on some of the aspects of a convenient means for rationalizing a different heading from that to which all other navigational data points.

While letters rogatory are cumbersome and not the best means of eliciting information about an event, it would seem that if the ILLINOIS were being turned so rapidly by the current, Pilot Hai would have mentioned this fact when asked if there was any change in the course or speed of the ILLINOIS during the two minutes between the time he left the bridge and the time he disembarked from the ILLINOIS (Tr 40:18-22).

Further, if the ILLINOIS had swung around 26 degrees in the two minutes before the pilot disembarked from the ILLINOIS, the pilot boat would have been on the same side as the UNION STAR. Thus, the UNION STAR personnel would have seen the pilot entering the pilot boat. However, Pilot Dy testified that when he first saw the pilot boat leaving the ILLINOIS, it was "just emerging from the bow of the ILLINOIS" (Tr 210:21-23).

(2) If the ILLINOIS had swung around to approximately course 182°, the UNION STAR would

have been on the port side of the ILLINOIS, not the starboard.

When Pilot Hai left the bridge of the ILLINOIS at 11:37, we have seen that the ILLINOIS was on a heading of 145°. At that time, Pilot Hai stated that the relative bearing of the UNION STAR was one point on the starboard bow of the ILLINOIS (Tr 56:18-21). This would place the UNION STAR on the east side of the channel and to the east of the exit range.

Thereafter, Captain Sorensen says the ILLINOIS swung around 40 degrees to approximately 182°. It had swung to this course, he says, at 11:40.

Yet Captain Sorensen then testifies that he went to the *starboard* wing of the bridge to take a bearing on the UNION STAR (Tr 120:2). Then again, when he says he heard the single whistle blast of the UNION STAR, he again "walked across the deck toward the starboard side" (Tr 122:23-24).

In fact, if the UNION STAR were located on the starboard of the ILLINOIS at a time when the ILLINOIS was heading south, the UNION STAR would be out in the middle of the river channel. To then say that the UNION STAR was in the middle of the channel heading east toward the Korhyu Wreck Buoy is to attempt to explain one unreasonable act by hypothesizing another. As we have mentioned earlier, such a hypothetical movement cannot be justified as an attempt by the UNION STAR to align herself with the exit range because this range has no bearing on the naviga-

tion of ships proceeding upriver from the pilot station.

(3) It is physically impossible for a vessel using an easy left rudder and full speed ahead to move 100 feet parallel in one minute.

Captain Sorensen stated that the ILLINOIS was moving ahead at about 3 knots in the time between ordering the left turn at 11:40 and settling on the range line at 11:41 (Tr 126:15).

This would give a speed of advance during the first minute of approximately 1/20th of a nautical mile or 293 feet.

The ILLINOIS is 455 feet long.

Obviously part of the ILLINOIS would have had to move sideways through the water to settle the ILLINOIS on the range line on course 182° by 11:41. It is even more ludicrous to imagine that this happened in the manner acted out by Captain Sorensen.[5]

Note, too, that the basic nature of a ship's turn is important. A ship swings as if on a pivot around

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[5]"A. Then I told the Third Officer who was on duty, full ahead, full ahead. Then I told the man at the wheel, 'Come left just a little, matter of a couple of degrees, fellow. Take it easy now, just a couple of degrees.' Then I went to the port wing of the bridge, looked astern toward the range, was exactly smack on the range." "Q. I understand you went to the port wing and checked your position with relation to the range line?" "A. Yes, yes." "Q. Did you get on the range line?" "A. Yes, a couple of degrees left a little bit, to get right on the range line." "Q. What did you do when you got to the range, Captain?" "A. Well, I steadied the ship on the range, on that particular course." "Q. Do I understand from that, you gave an order to the helmsman?" "A. 'Steady now, she's moving very, very little.' I said, 'Steady now.' She was right on the range." (Tr 121:11-25; 122:1-9)

a point along its length. The exact position of this pivot point varies from ship to ship. It may be assumed for the average ship to be located from one-fourth to one-third of the length of the ship from the bow. Knight's Modern Steamship, 12th Ed., 192: "When the rudder is first put over and the stern starts to swing, the forces resulting from the momentum of the ship and the rudder action tend to move her sideways from the original course in the opposite direction to the turn" (Knight's Modern Seamanship, 12th Ed., 192).

Note too that Captain Sorensen estimated the turning radius of the ILLINOIS at 4 knots to be about 600 feet. Thus to move 100 feet parallel requires the movement over an "S" curve with two 600-foot radii (Tr 135:16-18).

(4) If the ILLINOIS had actually been headed south on the exit range on course 182° at 11:41, there would have been no collision as the ILLINOIS and the UNION STAR would have been on a divergent course.

Assume that the ILLINOIS had been 400 meters to the northwest of the Korhyu Wreck Buoy and to the west of the exit range line on a southerly course along said line. Assume further that the ILLINOIS stayed at all times directly on that line or to the west of it.

As indicated earlier, the UNION STAR's original course would have carried her to the east of the range line until a point some distance upstream (north) of the point where the ILLINOIS had dropped her pilot. Thus if the ILLINOIS had either remained at the pilot station or proceeded

downstream and out the river, the UNION STAR would have passed well astern of the ILLINOIS.

There is thus good reason to doubt the testimony of Captain Sorensen that the ILLINOIS was headed south between 180° and 185° at the time when the ILLINOIS started to move away from the pilot station.

THE ANCHORAGE POSITION OF THE UNION STAR

There remains to Appellee one method for rehabilitating the testimony of Captain Sorensen. This is to convince the Court that the UNION STAR was not originally anchored to the east of the channel but rather in the middle of the channel, to the west of the exit range line. Captain Sorensen has attempted to do this by testifying at various points that the bearing of the UNION STAR at anchor was 215° (Tr 118:1-4; 115:6). In his testimony, he does not clarify whether the 215° bearing was true or relative. However, in his diagram of the situation it becomes quite clear that Captain Sorensen has adopted a position for the UNION STAR anchorage which is in the middle of the Saigon River and on a true bearing of 215° from the point where the pilot disembarked.

One obvious problem with this version of the events is that there is no rational explanation for the development of a collision situation. If the UNION STAR were anchored at a point bearing 215° true from the place where Pilot Hai disembarked, she would be located several hundred meters to the west of the exit range line. From that position, the safest and most direct course up the river

would be due north. This course would naturally diverge from the course of the ILLINOIS proceeding out the river on the exit range.

Proctors for Appellee have attempted to rationalize an eastward movement of the UNION STAR from the anchorage hypothesized by Captain Sorensen. They suggest that the UNION STAR proceeded eastward, cutting across the bow of the ILLINOIS in order to get on the exit range and follow it up the river. As we have previously noted, the exit range is only useful for movement out of the river from this point. To follow it in would shortly lead a ship aground. Thus the anchorage position which Captain Sorensen claims for the UNION STAR is logically unconvincing and leads to no acceptable explanation of how the collision could have occurred under that version of the events.

Finally, Captain Sorensen's story concerning the UNION STAR's anchorage has internal weaknesses. First, Captain Sorensen testified that at 11:40 he took a bearing (Tr 153:17) which indicated the UNION STAR to be located at 215° (we will assume this to be a true bearing for the moment), approximately three-tenths of a mile distant (Tr 115:7-10). Her anchor was out and her anchor chain leading forward of the bow at a visible angle (Tr 151:16-19). Yet one minute later, at 11:41, when the UNION STAR "surprised" Captain Sorensen, she was heading east, clearly underway, and only 300 to 400 feet distant (Tr 123:19-24). The UNION STAR was said to be moving at 2 or 3 knots (Tr 125:12-25; 126:1).

Assume for the purpose of argument that the UNION STAR was located three-tenths of a mile from the ILLI-

NOIS bearing 215° T and heading slightly north of east with her anchor free of the bottom, lying dead in the water at 11:40. Presumably on the basis of these assumptions the UNION STAR would need only to put its engines ahead full in order to be located 400 feet off the starboard bow of the ILLINOIS at 11:41. However, in order to cover the two-tenths of a mile separating those points in one minute, the UNION STAR would have had to average a speed of 9 knots. Not only is such movement from a dead stop physically impossible for a ship such as the UNION STAR, but, in addition, Captain Sorensen testified that the UNION STAR's speed at the end of that minute was 2 or 3 knots. Further, Captain Sorensen said the UNION STAR's anchor chain was leading forward the minute before. Thus the UNION STAR would also either have had to heave in its anchor during that minute or drag its anchor along while covering the two-tenths mile distance.

Thus Captain Sorensen's placement of the UNION STAR's anchorage at a point in the middle of the Saigon River to the west of the exit range is internally inconsistent and logically implausible. This placement should be ignored in favor of the anchorage location indicated by witnesses of the UNION STAR which was corroborated, as we have seen, by the only impartial witness, Pilot Hai.[6]

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[6]Pilot Hai placed the UNION STAR anchorage upstream from the Kontum Buoy and downstream from the Korhyu Buoy (Tr 35:24, 25) and slightly to the west of a line between the buoys (Record 53: No. 45). Pilot Hai also said that when the ILLINOIS was on a heading of 145° T, the relative bearing of the UNION STAR was one point on the starboard of the ILLINOIS (Tr 56:18-21). This second position plots in about the same position as the first, both of which are consistent with the UNION STAR testimony.

Only one other witness purported to give a position for the UNION STAR prior to the time she got underway. This witness was Second Mate McCarthy, who was loyal to his Captain but even less convincing. McCarthy states that the UNION STAR was located about 2 points (22°) off the starboard bow of the ILLINOIS at a distance from a half to one mile. Unfortunately, this bearing is not very useful in establishing the position of the UNION STAR as we do not know the heading of the bow of the ILLINOIS at the time. An attempt to make this bearing meaningful by attempting to fix the time of the visual bearing and relating it to a previously determined course proves unsatisfactory. McCarthy's testimony as to the time of the bearing or the location of the ILLINOIS proves to be vague or inconsistent.[7]

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[7]At one point Mate McCarthy indicated that he was just abeam of a wreck called Alfonso's Wreck which is apparently down near the Korhyu Wreck Buoy and thereafter, indicated that the vessel was not at that point but at a point approximately abeam of Cape Eperon. Then Mate McCarthy indicated that the position could be a little further south and, in fact, the inference is that Mate McCarthy is not clear where the ILLINOIS was at the time. The only inference we can draw from the totality of Mate McCarthy's testimony is that the ILLINOIS was probably still heading south on course 180° at the time that he made the observations alleged. We draw this inference for several reasons:

(1) Lunch was served aboard the ILLINOIS at 11:30 (Tr 62:4; 69:1).

(2) McCarthy indicated that he felt the engines stop while he was eating (Tr 75:18-25).

(3) The engines stopped at 11:32 (Tr 155:20).

(4) In order to be in the dining salon and eating at the time the engines stopped at 11:32, Mate McCarthy must have left the bridge of the ILLINOIS some time prior to 11:30. McCarthy indicated that he was on the bridge for approximately 5 minutes before going to lunch (Tr 62:11-13).

(5) McCarthy makes no mention of any course change during the five minutes that he was on the bridge although he was asked about the course and indicated that he did

Thus in summary there is no doubt on the basis of all the evidence that the UNION STAR was anchored near the east shore of the Saigon River and to the east of the exit range line in about the position testified to by the pilots for both vessels and by Captain Hu of the UNION STAR. From this anchorage position, the UNION STAR clearly proceeded up the east side of the channel, close to the Korhyu Wreck Buoy and to the east of the exit range. Any other course suggested by the evidence would have been physically impossible under the circumstances given a collision close to the Korhyu Wreck Buoy and slightly to the northwest of it. Finally, all evidence points to the fact that the ILLINOIS did not swing southward while dead in the water at the pilot station but rather remained approximately on the 145° heading on which she came to a stop.

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not know what course was being steered at the time he was on the bridge (Tr 69:5-11).

(6) Consequently, there is strong inference that the ILLINOIS was probably on a single course at the time that Mate McCarthy was on the bridge and that this single course was a course being followed by the vessel prior to 11:30. The only steady course followed for five minutes or more prior to 11:30 was the 180° followed up to the time the vessel was abeam of Cape Eperon. Consequently, we would infer from the sketchy testimony that the ILLINOIS was probably on course 180° at the time of McCarthy's relative bearing. On the basis of this evidence, a position 180° and approximately one mile distant is in fact the most accurate position which can be plotted from Mate McCarthy's testimony. Even if the ILLINOIS were on course 159° at the time Mate McCarthy saw the UNION STAR the bearing would not at all coincide with any other testimony of the UNION STAR's anchorage in this case.

EXPLANATION OF THE NAVIGATION OF THE ILLINOIS

If one grants, as one must, the validity of the testimony of the UNION STAR's witnesses and of Pilot Hai, what explanation can be made for the bizarre movements of the ILLINOIS and for the testimony of her Captain. We would suggest that almost all of the testimony of Captain Sorensen can be reconciled if we grant that he made one slight mistake just prior to the time of collision.

It will be noted that if it is accepted that the ILLINOIS remained on an eastward heading of 145° while releasing her pilot, then Captain Sorensen's testimony that the UNION STAR was located on the starboard side of the vessel becomes correct. In fact, the 215° bearing (which would be approximately one point off the starboard bow if heading at 182°) becomes the approximate relative bearing of the UNION STAR anchorage when the heading of the ILLINOIS is 145°. This would, incidentally, conform exactly to the testimony of Pilot Hai of the ILLINOIS (Tr 56:18-21).

Pilot Hai had cautioned Captain Sorensen that it was very important to keep properly aligned on the exit range in order to safely leave the river. This range caused Captain Sorensen some difficulty for several reasons. For one, the range marks were probably difficult to discriminate and keep in sight, one being merely the curve of the shore and the other the peak of a mountain 8 miles away. The Hydrographic Office Sailing Directions (H.O. Publication No. 125, Ex. H) indicates that the range marks for the normal entrance (which is a *different* range from the *exit* range which is at issue in this case) are difficult to recognize due to the surrounding foliage (Ex.

II, page 149). It is probable that the curve of the shore serving as the closer *exit* range mark was similarly obscured by surrounding foliage. The second reason why Captain Sorensen was nervous and apprehensive about the departure from the pilot station was that there were no buoys or other navigational marks ahead of the vessel by which to guide his departure once he passed the Kontum Buoy. Thus he faced an unmarked expanse of river and sea, knowing that passage through only one small part of it was safe. Thirdly, the only guidance which Sorensen was to have on this passage through this region was the range and the range marks upon which the course was to be based were located in a direction opposite the direction of travel of the vessel. This is a relatively unusual set of circumstances in any harbor and, when such instances occur, the navigation is the responsibility of a pilot. Here Captain Sorensen was faced with the unusual problem of safely navigating southward based on solely reference points astern of the vessel. This would require Sorensen to navigate and give helm commands while facing aft.

One can easily imagine the problem he perceived. When the range marks opened in such a way that he knew from his experience that a right rudder command was necessary, for this passage he would have to give a left rudder command. Captain Sorensen undoubtedly had the need for this conversion of his helm orders in the forefront of his mind so to speak.

When it came time to get underway, however, the ILLINOIS was not facing south along the range line, but rather at an angle to it. Thus initially he wanted to turn

south. The proper command was a gradual right turn (Tr 207:5-11). As Captain Sorensen stood facing north,[8] however, his mind was preoccupied with the necessity of reversing the commands for this exit. Thus, as he stood then facing the exit range markers, he gave a gradual left rudder command.

Shortly thereafter as the ILLINOIS started to swing across the range line, Sorensen realized his error. He immediately stopped the engines and ran to starboard to analyze his vessel's position with respect to the inward bound UNION STAR. Seeing the proximity of the UNION STAR, he ordered the engines back full. Sorensen immediately realized that the momentum of the ILLINOIS' swing to the east was too great to stop in time. He thus put the ILLINOIS' rudder hard over to the left and her engines at full ahead to attempt to bring the vessel parallel to the UNION STAR. The Captain of the UNION STAR complemented this action by reversing UNION STAR's engines and swinging her stern to the north so that when the vessels met they were parallel.

We believe that the foregoing account fairly represents the events leading up to the collision on August 26, 1960. While the cause of the accident was understandable, to us, a captain is given few chances for error, reasonable or

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[8]Counsel for ILLINOIS tried to establish that Captain Sorensen was standing on the port wing of the ILLINOIS' bridge, facing aft on course 180° when the first helm order was given by Captain Sorensen. Captain Sorensen's reply was to qualify that implication as he said, "Yes, that is, in other words, due north, due north" (Tr 122:10-17). Again, Sorensen's actual recollections came through and he indicates that when facing north, he was not facing aft as the ILLINOIS was not on a southerly heading at the time, but rather heading southeast on a 145° heading.

not. The left hand turn of the ILLINOIS was a known and irrevocable fact, as was the position of the ILLINOIS when she reached the pilot station. The heading of the ILLINOIS when she started again at 11:40 after the pilot's departure was not clearly documented and probably was not carefully noted. Thus, it could be said that if the ILLINOIS were heading south at the time she got underway, the orders of the ILLINOIS helm would be proper and faultless. Thus, when the log was written that day on the ILLINOIS describing the events of the collision, specific mention was made of the fact that the ILLINOIS was on a heading of 180° true, while no other headings were given in the log (not even an indication of whether the reported bearing of the UNION STAR was relative or true).

It seems significant in corroboration of the above detailed description of the events of the collission that Captain Sorensen did not present Captain Hu of the UNION STAR with a protest after the collision at the time Captain Hu protested to Sorensen (Tr 244:15-25; 245:1-11). It is also significant that the counsel for ILLINOIS presented no witness other than Captain Sorensen who had any knowledge of the details of the navigation of the ILLINOIS. Even the testimony of Pilot Hai was obtained only after much objection from ILLINOIS counsel.

To summarize, the UNION STAR simply started up the Saigon River to the far right of the channel, keeping at all times as far to the right as possible to give the ILLINOIS room to turn south and depart from the river. By mistake, the ILLINOIS initially turned to the left across the exit range line and across the course of the

UNION STAR. The proximity of the vessels did not allow maneuvering room to correct this error. Since the vessels were both proceeding quite slowly, the subsequent maneuvers of both captains were adequate to bring the vessels parallel before they collided, facing eastward on the far east side of the channel with the ILLINOIS to the north.

SPECIFICATION OF ERRORS

1. In finding and concluding that libelant was entitled to a decree, and in entering a decree in favor of libelant in the amount of $20,937.48.

2. In finding and concluding that libelant was entitled to damages.

3. In finding and concluding that respondents and cross-libelant were negligent.

4. In finding and concluding that the damages claimed by libelant were caused by the negligence of respondents and cross-libelant.

5. In failing to find and conclude that the damages which libelant alleged, to the extent such in fact occurred, were caused by the greater fault of libelant and failing to apportion the damages awarded accordingly.

6. In excluding the testimony of respondents' and cross-libelant's witness Marine Engineer John V. Walsh that libelant's vessel could have been repaired in a shipyard in Japan for a cost far below the cost of repairs actually incurred in a shipyard in the United States.

Offer of testimony by expert witness John V. Walsh that repairs to libelant's vessel could have been made in a

port in the Far East at a cost approximately $25,000 less than that incurred in the United States by respondent (Tr 305:3-306:8). Objection to the evidence on the grounds of irrelevance was sustained (Tr 306:5-8).

7. In finding and concluding that libelant's subsidy contract with the United States justified charging respondents and cross-libelant with costs of repair of libelant's vessel incurred in the United States in excess of the much lower costs of repair available to libelant at the same time in Japan.

8. In finding and concluding that libelant was entitled to include as an item of its damages the cost of drydocking its vessel at the Puget Sound Bridge & Drydock Co.

9. In failing to find and conclude that the libel was barred by laches and that libelant had failed to prove excuse for late filing of the libel and to show that respondents and cross-libelant had not been prejudiced by the late filing.

10. In awarding libelant as damages costs of repair to its vessel incurred at the Puget Sound Bridge & Drydock Co. in excess of the much lower costs of repair available to libelant at the same time in Japan.

11. The decree is contrary to law in that it is not supported by the findings of fact.

SUMMARY OF ARGUMENT

1. The Findings of Fact of the trial court are not supported by the evidence. This Court is entitled to re-examine the findings of fact since all the evidence on the navigation of the vessels was presented to the trial court by deposition. *The Ernest H. Meyer* (9th Cir. 1936) 84 F.2d 496, 501.

2. The UNION STAR was not at fault in any way. The trial court erred in finding that the UNION STAR had no lookout and that such absence of lookout resulted in a lack of information aboard UNION STAR which contributed to the collision (R.91). The UNION STAR had a qualified lookout at all times and was continually aware of all movements of the ILLINOIS (Tr 276:1-4). The navigators aboard the UNION STAR lacked no information perceivable from the UNION STAR concerning the ILLINOIS' movements. On the basis of all the perceivable information, the UNION STAR was properly navigated at all times and did not contribute to the occurrence of the collision. Thus The Finding That The UNION STAR Was At Fault Should Be Reversed.

3. The trial court committed reversible error in failing to make any findings concerning both the events leading to the collision and the allegations of fault based thereon (Order—R.87) since the applicable rule of damages was one of apportionment based upon relative gravity of fault (Tr 287:11-23).

4. The trial court erred in failing to find that the ILLINOIS committed several serious faults of navigation in attempting a difficult maneuver in close proximity to the UNION STAR and in turning east across the course

of the UNION STAR. The ILLINOIS was obligated, under the circumstances, to keep to her starboard side of the channel and pass port to port. *The Vanderbilt v. McKibbon* (1869) 73 U.S. (6 Wall.) 225, 230, 18 L. Ed. 823. The failure of the ILLINOIS to observe this rule of navigation was the primary cause of the collision (Tr 213:2-4). Thus The District Court's Finding Should Be Modified To Hold The ILLINOIS Solely At Fault In Causing The Collision At Issue.

5. The libel is barred by laches and should have been dismissed. The libel was filed beyond the analogous two-year limitation period under the law of Viet Nam for property damages actions (Tr 322:17-25) applicable by reason of the California "borrowing statute." California Code of Civil Procedure section 361. Because the libel was filed beyond the analogous limitation period, libelant had the dual burden of proving an excuse for delay in filing and non-prejudice to appellant. *Brown v. Kayler* (9th Cir. 1959) 273 F.2d 588. Absolutely no evidence of an excuse for the delay in filing was introduced by libelant, and there was overwhelming evidence of prejudice to appellant by reason of the late filing, including unavailability of key witnesses (such as the helmsman and watch officer of libelant's vessel) and vagueness in the memories of available witnesses (Tr 100:20-101:15). The libel should therefore be dismissed.

6. Libelant's $40,053.60 item of damages for vessel repairs performed in the United States (Respondent's Exhibit O, p. 10; Finding of Fact X, States Steamship Company, Item 9, R.85) was excessive and unreasonable and should have been stricken from the damages allowed

libelant because libelant failed to mitigate its avoidable damages as required by law (American Law Institute, *Restatement of Torts,* Section 918) by obtaining the most reasonable costs of repair available at the time of the collision. (Tr 298-299; 305-306) *Navigazione Libera T.S.A. v. Newtown Creek Towing Co.* (2d Cir. 1938) 98 F.2d 694, 1938 A.M.C. 1419. Libelant also failed to sustain its burden of proof that the cost of repair to its vessel was reasonable, and the item should therefore be stricken. *Carolinian-San Clemente* (N.D. Cal. 1948) 1943 A.M.C. 758.

Libelant's defense that it was required to perform its repairs in the United States by reason of its subsidy contract (Res. Exhibit R) is not supported by the applicable Federal statute (46 U.S.C.A. 1176(7)) or by the subsidy contract, and even if either did require such exorbitant repairs, appellant cannot legally be charged with the excessive cost. *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, 309, 72 L. Ed. 2d 290, 292. Furthermore, to enforce this excessive cost of repairs against this vessel of the Republic of China would violate the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946 [November 30, 1948] T.I.A.S. No. 1871.

7. The trial court committed reversible error in ruling (Tr 306:5-8) irrelevant and inadmissible testimony of appellant's expert witness that libelant's repair costs were excessive and that much lower costs of repair were available in the Orient (Tr 305:13-306:8). The availability of lower repair costs was clearly relevant under universally accepted principles of tort and admiralty law.

Zeller Marine Corp. v. Nessa Corp. (2d Cir. 1948) 166 F. 2d 32, 1948 A.M.C. 418; *The F. J. Luckenbach* (E.D. Pa. 1929) 42 F.2d 279; *Carolinian-San Clemente* (N.D. Cal. 1943) 1943 A.M.C. 758; *Atkins v. Alabama Drydock & Shipbuilding Co.* (S.D. Ala. 1961) 195 F.Supp. 944, 1961 A.M.C. 909.

8. Libelant's $5335 item of damages (Respondent Exhibit O, p. 10, R.85) for drydocking its vessel during repairs should be stricken. The drydocking was unnecessary to perform the repairs arising from this collision according to the only expert who testified on this subject (Tr 310:23-312:13), and libelant introduced no evidence to sustain its burden of proof that the drydocking was necessary or the expense reasonable. *The Cape Friendship* (D. Md. 1951) 100 F.Supp. 856, 1951 A.M.C. 1952, 1958.

I. THIS COURT IS ENTITLED TO RE-EXAMINE FINDINGS OF FACT BASED SOLELY ON DEPOSITIONS.

There is an old saying that an admiralty appeal is a trial *de novo.* This is probably an unfortunate phrase in its implication of "an actual repetition on appeal of the trial below, when, in fact, that has never been the practice." Staring, *Admiralty Appeals,* 35 Tul. L. Rev. 7, 51 (1960).

What the term does mean is that among the powers of the Court of Appeals sitting in admiralty is the power "to do actual justice, free, as we have already noted, of the rigid limitations inherent in a system based on jury trial." (Staring, op. cit. p. 51)

This power is usually exercised with considerable restraint where the testimony below was from witnesses present in court because the findings of fact in the trial court are based in part upon the balancing of credibility of the witnesses. Where the demeanor of the in-court witness affects the balance in the mind of the trial court, there can be no proper review of this finding from the cold record.

When, however, as in the case at bar, the findings of fact are based entirely on testimony taken outside of court, the findings of the trial court are based on no more evidence than is available to the Court of Appeals. Hence the findings of fact of the District Court are entitled to lesser weight than would ordinarily be the case. As this Court so well stated in *The Ernest H. Meyer* (9th Cir. 1936) 84 F.2d 496, 501:

> "Pursuing the principle of the *Ariadne* thus controlling the Supreme Court, we weigh the evidence in an admiralty new trial with the rebuttable 'prima facie' presumption that the findings of the District Court are correct, just as any trial court weighs evidence where a presumption has been established. *The value of this presumption* in determining the total weight of the evidence *is affected by the amount of testimony below which was actually heard by the Court, and the amount, if any, in depositions.* Where all the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption has very great weight.
>
> "It is obvious that, where the testimony is in part in deposition and in part heard by the Court, *and the conflict is between the heard and the unheard wit-*

nesses, there cannot be a balancing of credibility between the two. In such a case, and *where all or substantially all* of the evidence pertinent to the finding is given *by deposition,* the presumption *is of lesser weight* and more easily may be rebutted. *The Natal* (C.C.A. 9) 14 F.2d 382, 384: 'The rule that findings of fact are entitled to great weight in an appellate court is modified where, as here, they are based wholly upon depositions.' *U. S. v. Los Angeles Soap Co. et al* (C.C.A. 9) 83 F.2d 875, decided May 14, 1936.

"In this case the evidence of all the officers and crews of both vessels, testifying to their control of their respective movements toward the collision, is by deposition. The presumption supporting the findings below, therefore, *has the slight weight described* in The Natal, supra." [Emphasis added]

We consequently respectfully submit that this Court is entitled to completely review the facts of the case at bar in order to make a finding as to the manner in which the collision occurred and in order that the findings will be supported by the evidence.[9]

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[9]In re-examining the facts of this case, it is important that this Court be aware of the peculiar nature of the evidence available. Opposing counsel has made a point, from time to time, of the incomplete nature or confusing quality of some of the evidence presented by Appellant. We are sure we need not belabor the point that while opposing counsel has a client located in the city in which the action took place and witnesses and records in his own tongue, Appellant's evidence is generally either in halting English or translated French. For example, a review of Captain Hu's deposition indicates clearly that he did not understand certain questions and some answers are clearly suspect on this basis. (Also, the fact that he was testifying some four years after the event without any notes or other basis for refreshing his memory results in some clouded recollections which tend to be exaggerated ((particularly in distance)) in his mind.) The testimony of the two pilots was taken by letters rogatory by trans-

II. UNION STAR WAS NOT AT FAULT IN ANY WAY.

The District Court found that the UNION STAR was negligent and that such negligence was a cause of the collision. The Court further erroneously found that the UNION STAR's fault was equal to the fault of Appellee and that the damages claimed by Appellee were caused by such negligence (Record 91-93). These findings are unsupported by the facts in the record.

A. UNION STAR was not at fault for "absence of a proper lookout."

The only causative fault attributed to the UNION STAR which is identified in the findings of the District Court is the finding that "There was no one aboard the UNION STAR who was posted and designated as a lookout and functioning as such, unencumbered with other duties or responsibilities." Consequently, the Court found "That the absence of timely and accurate information and knowledge aboard the UNION STAR regarding the movements of the ILLINOIS contributed to the ensuing collision" (Record 91). The District Court was in error in so finding.

1. The UNION STAR had a proper qualified lookout.

It will be shown from the Record that the UNION STAR did have a proper lookout on the bridge, that those in charge of the UNION STAR navigation observed the

lating all English questions into French and translating all French replies back into English. The problem of language differences, the extreme length of time between the occurrence in Viet Nam and the time when the depositions were taken, the cumbersome and inaccurate procedure of obtaining testimony by written interrogatories over thousands of miles, the elimination or loss of many of Appellant's key witnesses by death, distance, and the war in Viet Nam make it difficult to match the smooth surface consistency of the story of the ILLINOIS witnesses.

ILLINOIS early and continuously, that there is absolutely no evidence in the record that there was no lookout in the bow of the UNION STAR, and that even if there was an absence of a lookout in the bow of the ship, such an absence would be entirely irrelevant and have no causative relation whatever to the collision.

It must be kept in mind that on the day in question, the visibility was good (ILLINOIS Log Ex. 3). Pilot Hai, on board the ILLINOIS, estimated that he "was able to see the M.S. UNION STAR when we were at a distance of not less than six miles from her" (Tr 38:11-13).

This case then, does not involve a collision between vessels navigating in a fog, or under conditions of impaired visibility. No contention is made by either vessel that there was any difficulty in clearly seeing the other vessel and its maneuvers. Moreover, there is no contention by the ILLINOIS that the UNION STAR did not timely see it and thereafter follow its every move, or that those on watch on the UNION STAR were otherwise occupied than with the conduct of the ILLINOIS, as it proceeded towards the UNION STAR.

There were four men on the bridge of the UNION STAR, the point of greatest vantage, who were concentrating on the channel downstream (Tr 251:16): the pilot Phan Van Dy, the Master Captain Hu, the Quartermaster, and the Third Officer. On the forecastle were the Chief Officer, the boatswain, the carpenter, and a few seamen (Tr 251:12).

Pilot Dy had seen the ILLINOIS well before boarding the UNION STAR. As soon as he reached the bridge of the UNION STAR, he again noticed the ILLINOIS

(Tr 204:25; 205:1-3). Pilot Dy observed the ILLINOIS continuously, noticing among other things, the emergence of the pilot boat from behind the bow of the ILLINOIS (Tr 210:21-23). Pilot Dy observed the kick of water as the ILLINOIS' propeller began turning at full ahead revolutions while the ILLINOIS was on an apparent gyro heading of 145° (Tr 211:15-22). Of course, Pilot Dy continued to observe the ILLINOIS thereafter until the impact of the collision.

Captain Hu, Master of the UNION STAR, observed the ILLINOIS at the time the UNION STAR commenced heaving in its anchor (Tr 230:19-25). The subsequent testimony of Captain Hu indicates that he was watching the movements of the ILLINOIS at all times although his recollection of what he saw was somewhat clouded four years later at the deposition. Frequently Captain Hu mentions a series of bearings taken on the ILLINOIS to check its position relative to the UNION STAR (Tr 238:3, 18-20; 239:12-15). Captain Hu recalled seeing the pilot boat near the ILLINOIS. Once the anchor of the UNION STAR was free of the bottom and she was underway, Captain Hu stationed himself on the starboard wing of the bridge where he remained until shortly before the collision (Tr 264:4, 13). Captain Hu observed the bow wave of the ILLINOIS indicating she had started moving forward (Tr 269:5-9). Captain Hu further testified that from the time he came on the bridge and saw the ILLINOIS, he continuously watched her until the time of collision (Tr 276:1-4).

From the foregoing it is established conclusively that two officers with master's licenses were watching the

navagation of the ILLINOIS at all times and that for most of the period while the UNION STAR was underway prior to the collision, the Master was on the wing of the bridge doing nothing except observing the ILLINOIS. He watched the ILLINOIS continuously from the time he first saw the vessel until the time of the collision, standing on the starboard wing of the vessel almost all of this time.

Consequently, Captain Hu's undivided attention was as lookout watching the ILLINOIS, so that, from the time the UNION STAR got underway, he neither had other duties to perform, nor did he perform any other function, until the situation was such that collision was inevitable. He testified that he watched the ILLINOIS continuously from the time he first saw the vessel. No other lookout could have done more, no matter who he might have been or where stationed.

Pilot Dy also saw the ILLINOIS, observed her course, and actually watched her movements continuously. Thus the man in charge of the UNION STAR's navigation and the man acting as her lookout on the open bridge both saw the ILLINOIS and observed her continuously. What another lookout, in the bow or any place else, could have added to this is difficult to see.[10] Such a lookout could

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[10]Counsel for Appellee have stated that a lookout might have reported the ILLINOIS' whistle signal. However, there was no need for the lookout to repeat the whistle signal as it was clearly heard by Captain Hu and Pilot Dy. As Captain Hu explained in his deposition (Tr 284:13-25; 285:1-24), his prior statements that he heard whistle signals from the ILLINOIS were correct and any inconsistency in the deposition is due to the lapse of time. Thus there was no whistle signal unheard by Captain Hu as implied by counsel for Appellee.

not have furnished to those on the bridge any information which they did not already have.

In addition, the District Court erred in finding there was no specifically designated lookout aboard the UNION STAR. There is no evidence to support this finding. Captain Hu was never asked whether or not there was a lookout. In fact, the evidence indicates that there was a lookout but that he was not making any reports under the circumstances:

> "Q. After you heaved anchor, but before the collision, did the lookout make any reports to the bridge?"
>
> "A. No, because the weather was very clear." (Tr 251:8-10)

Consequently, even to find that there was no specifically designated lookout aboard the UNION STAR is a finding completely unsupported by the evidence. On this ground alone, the decision below should be reversed.

2. Assuming, arguendo, that no specially designated lookout were posted, UNION STAR nevertheless had adequate lookouts at all times.

Assume, however, for purposes of this assignment of error that it could be found on the basis of the facts in the record that there was no specially designated lookout. Even then the UNION STAR could not be deemed legally at fault.

Under the circumstances of this case the decisions (such as those cited by the District Court (Record 87)) condemning a vessel for failure to have a proper lookout, on the bow or elsewhere, are not in point. In those cases

the men in charge of the vessel did not see clearly what the other ship was doing, and a proper lookout might have given them the missing information and so avoided trouble. Here, those in charge of the UNION STAR saw everything that was to be seen, and no suggestion is, or can be, made that a lookout on the bow could or would have seen more than did Pilot Dy and Captain Hu.

To put it differently, the law does not lay down formal rules of thumb for a lookout the violation of which automatically carries a penalty. The lookout is only a part of the general requirement that every vessel shall take all reasonable precaution to avoid accidents by informing itself of the presence and movements of any other craft which may present a hazard. If in fact the vessel does see and follow the movements of such other vessels, she has done all that is necessary as far as lookouts are concerned. *The Victory* (1894) 63 Fed. 631, 638.

The law requires only that the vessel's navigator be informed of the presence and movements of other vessels, not that he be so informed by a lookout on the bow or any place else. He need not require that the information he obtains be relayed from a lookout, but rather, may, as was the case here, gain information for himself by his own observation and by that of a lookout on the bridge.

If we may draw an analogy, we can compare this question to the issue of seaworthiness. Failure to exercise due diligence to make a vessel seaworthy is immaterial if in fact the vessel was seaworthy. So, in this case, the failure of the UNION STAR to have a lookout in the bow to observe the ILLINOIS is immaterial when her pilot and lookout on the bridge saw the ILLINOIS, observed its

course, and followed its movements continuously thereafter.

It was claimed in the trial court by opposing counsel during oral argument that a lookout on the forecastle might have heard the ILLINOIS' two-blast signal and that she thus would have known the intentions of the ILLINOIS, thus avoiding the collision.

In the first place, the two-blast signal was heard by all persons on the bridge and a report from the forecastle lookout would have been merely an unnecessary added drain on the navigator's time and attention.

However, let us assume that the lookout in the bow of the UNION STAR had given the bridge a report of the two-blast signal of the ILLINOIS. The situation would not have been altered in any particular. The UNION STAR would have done, and was legally required to do, exactly what she did—to keep to the far right of the river allowing the ILLINOIS the most possible room to maneuver.

Thus, a report to the bridge from the lookout on the UNION STAR's bow of his having heard the ILLINOIS' signal would have made no practical difference whatever—under all possible theories of the case the UNION STAR was entitled and required to do exactly what she did. Hence the absence of a forecastle lookout, even if it is assumed that he was absent, had no causative relation whatever to this collision. Thus clearly the failure of the forecastle lookout to make a redundant report could have no causative relation whatever to the collision.

The authorities leave no doubt whatsoever that the absence of a particular kind of lookout or even any lookout

at all is of no importance unless it is shown that such fault contributed to the collision. Decisions on this point may be multiplied endlessly.

Typical of the decisions is that of the Circuit Court of Appeals for the 4th Circuit, in the case of *The Georg Dumois,* 153 Fed. 833 (4th Cir. 1907) at page 835, wherein it was held:

> "Does the testimony show that, had a lookout been on duty at the time, that the collision would have been prevented? If so, the steamer was at fault; if not, the absence of the lookout was immaterial. In other words, it is well understood that faults which do not cause a collision or that have not borne directly upon it, are unimportant." (Citing cases)

In the case of *The Catalina* (9th Cir. 1938) 95 F.2d 283, 1938 A.M.C. 495, in a factual situation not dissimilar to our situation, this Court held that the burden was upon the vessel claiming faulty lookout to prove that fact. The ruling in that case is particularly appropriate here, both on the question of other duties of the lookout and on the question of hearing whistles. This Court said:

> "B. With regard to the attention of the lookout to his duties, the Ariadne rule (*The Ariadne,* 13 Wall. [80 U.S.] 475, 20 L. Ed. 542, 543 [1872]) requires the highest watchfulness, but this does not alter the burden of proof on the Catalina to establish that it was not exercised by the Arbutus' lookout. *When such proof is made,* certain adverse presumptions may arise as to its causative effect, but the proof of the lack of attentive watchfulness must come first.
>
> "The lookout was a qualified seaman. Two facts are offered to show his inattention in the approach of the collision. One was that he was ordered to wipe

the spray off the pilot-house windows. This, however, could not have been causative of the collision, because he had paid no attention to the windows after wiping them off some twenty minutes before the Catalina was sighted.

"The other fact was that he did not at any time hear the whistle of the Catalina. No one else on the Arbutus did. The testimony clearly supports the finding of the lower court that the motors on the Arbutus, nor the exhaust [sic], did not interfere with the lookout's hearing. The deflection of whistles in a fog so that they are heard at a greater distance but not nearby is too frequent a phenomenon for us to hold that the Catalina has sustained her burden of proof that this was not the reason her whistle was not heard on the Arbutus.

"We agree that the Catalina has not maintained her burden of proof that there was fault in the station or conduct of the Arbutus' lookout." 95 F.2d at 285-86.

Thus it is clear that the District Court erred in finding no adequate or stationed lookout on the UNION STAR as the Appellee did not sustain its burden of proof in this regard.

Even if there had been evidence of a lack of a properly stationed lookout who was specially designated as such, the District Court could not, on that basis alone, have found an inadequacy of lookout. In *Osaka Shosen Kaisha Ltd. v. Angelos, Leitch & Co.* (Atlas Maru-Elene) (4th Cir. 1962) 301 F.2d 59, 61, 1962 A.M.C. 1043, 1045-56, the Court, in holding that the lookout of the Atlas Maru was adequate even though there was no single person on the bow designated as lookout, said:

"It would be unfair and merely speculative to presume that the men on the bridge together with the five on the forecastle were not alert for the safe advance of their vessel. That was their intent and nothing else. . . .

"Moreover, beyond dispute the navigating officers of Atlas held Elene in eye constantly from the time Atlas was at Fort Carroll, some half hour before collision. All that was fairly observable, they observed. A crewman solely devoted to lookout could not have accomplished more. . . ."

3. Assuming, arguendo, a complete lack of lookout, the absence of such lookout would not be a fault unless such absence contributed to the collision.

Finally, even if the evidence had been clear that there was no proper and adequate lookout on board the UNION STAR, the law is clear that the absence of a proper lookout will not condemn a vessel, if it can be shown that the fault did not contribute to the collision.

The Fannie v. The Ellen Forrester (1871), 78 U.S. (11 Wall.) 238, 20 L. Ed. 114;

The Nacoochee v. Moseley (1890), 137 U.S. 309, 34 L. Ed. 687;

The George Murray (N.D. Ill. 1884), 22 Fed. 117;

The Mary Mosquito (E.D. Va. 1906), 145 Fed. 960;

The New York Central No. 22 (S.D.N.Y. 1903), 124 Fed. 750.

Appellant has clearly shown that UNION STAR could not and should not have been navigated in any other manner, even assuming that certain information known to her navigators was not so known.

In the case of *Mc Victory*, 168 U.S. 410, 42 L. Ed. 519, the Circuit Court, 63 Fed. 631 at 638 (1894), had the following to say on the subject of the claim that the lookout was improper:

> "It remains for me to deal with a few of the special aspects of the case. On the question of lookouts, I have been always exacting, and I think both steamers were at fault in not having had each a special lookout on duty; but in neither case does it appear that the absence of such a lookout contributed to this collision. Each ship was navigated by a licensed pilot, with her master at his side on the main bridge acting as lookout. It was in the daytime, and the way was as visible to the officers on the bridge as it could have been to a lookout at the stem. The master and pilot were in each case intent upon the duty in hand, and their orders to the helmsman and to the engine room would hardly have differed from those actually given if a lookout had been calling out to them what they both clearly saw and knew."

In the leading case of *The Maria Martin v. Northern Transp. Co.* (1871), 79 U.S. (12 Wall.) 31, 20 L. Ed. 251, a collision occurred on the Detroit River between two vessels approaching on intersecting courses. In holding that the question of the incompetency of the steamer's lookout was immaterial where the other vessel was timely seen, the Supreme Court of the United States held:

> "All three of the vessels—that is, the tug, the tow, and the steamer—had their signal lights properly displayed and the respective lights were burning brightly and were very easily distinguishable. Suggestion is made that the lookout of the steamer was incompetent, but the suggestion is entitled to no weight, even if it be well founded in fact, as the proof is entirely satis-

factory that the two colliding vessels were seen by each other in season to have taken every precaution to avoid a collision." 79 U.S. (12 Wall.) at 45, 20 L. Ed. at 254.

Thus it is satisfactorily and conclusively established from the foregoing authorities:

1. That the absence of a lookout on the bow is immaterial where the presence of the approaching vessel is timely and continuously observed by officers on the bridge.

2. That the absence of a lookout on the bow is immaterial where the presence of such lookout could not have availed to prevent a collision.

3. *A fortiori,* the failure of a stationed lookout to make a report to the bridge is immaterial where the report of the lookout could not have availed to prevent a collision.

In the instant case it is conclusively established that those on the UNION STAR saw the ILLINOIS continuously for a long period of time and at a considerable distance prior to the collision; and that there was nothing that any number of lookouts or lookout reports on the UNION STAR could have done to have prevented the collision.

It is therefore obvious that the UNION STAR has amply established that the absence of a bow lookout if such an absence could be found on the evidence, or the absence of reports from the stationed lookout was immaterial and did not in any manner contribute to the collision. Under these circumstances, and under the authorities heretofore cited, no fault can be found with the

UNION STAR in connection with its lookout. Consequently, the District Court erred in finding the UNION STAR at fault for failure to have a proper lookout.[11]

III. THE TRIAL COURT ERRED IN FAILING TO RULE ON THE OTHER ALLEGATIONS OF FAULT IN THE RECORD AND DISCLOSED IN THE EVIDENCE WHEN THE ADMITTED RULE OF DAMAGES APPLICABLE WAS ONE OF APPORTIONMENT BASED UPON RELATIVE GRAVITY OF FAULT.

The parties stipulated that the law of South Viet Nam applicable to the collision between the UNION STAR and ILLINOIS on August 26, 1960, with respect to the measure of damage liability was as follows:

> "1. If the collision is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which committed the fault.
>
> "2. If the two vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible

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[11]The cases cited by the District Court are inapplicable to the instant case. *The Madison* (2d Cir. 1918), 250 Fed. 850 involves a situation where the lookout failed to report an oncoming vessel which was obscured from the view of the master. It is, of course, obvious that it is the duty of the lookout to report those things which cannot be seen or heard by the master. In the instant case the master was aware of all vessels seen by the lookout. Similarly, *The Koyei Maru* (9th Cir. 1938) 96 F.2d 652 was a case where the night was murky and vision indistinct. The *Koyei Maru's* lookout in the bow did not report to the bridge the loom of a barge seen through the gloom. This is clearly distinguishable from the case at bar where vision was as clear to those on the bridge as to persons elsewhere on the ship. Thus the cases cited by the District Court are distinguishable and not relevant to this case.

> to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be appointed equally." (Tr 287:11-23)

The Court found as a fact that this quotation properly stated the applicable law of Viet Nam (Finding of Fact VIII—Record 91, 92). The Court further found as a fact that the collision took place in the territorial waters of South Viet Nam (Finding of Fact V—Record 4).

One of the most widely accepted of all "choice of law" rules has been that "The law of the place of the wrong determines whether a person has sustained legal injury." (RESTATEMENT, CONFLICTS OF LAWS, Section 377 (1934)) This traditional position is reiterated by Goodrich, CONFLICT OF LAWS 3rd Ed. (1949) Section 92. This doctrine is clearly established in admiralty. *Lady Nelson, Ltd. v. Creole Petroleum Corp.* (S.D.N.Y. 1954) 1954 A.M.C. 1279, *aff'd* (2nd Cir. 1955) 224 F.2d 591, 1955 A.M.C. 1670; *Esso Standard Oil, S.A. v. S.S. Gasbras Sul* (S.D.N.Y. 1964) 239 F. Supp. 212. The *Lady Nelson* is particularly relevant to the case at bar. In that action, the only connection between the collision and the forum was the fact that the respondent was an American corporation. The collision occurred in the territorial waters of Trinidad. It was held that the law of Trinidad should govern the case and that damages arising out of a mutual fault collision in foreign territorial waters should be apportioned according to the local proportional fault law.

The District Court consequently was in error in deciding that "in the circumstances of this case it becomes unnecessary to pass upon" the "other specific . . . faults

advanced by libelant and respondent . . ." (Order—Record 87)

IV. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE ILLINOIS WAS GUILTY OF SEVERAL SERIOUS FAULTS OF NAVIGATION.

A. The ILLINOIS was guilty of a serious causative fault in failing to maintain adequate watch on the surrounding waters and particularly on the adjacent UNION STAR.

The trial court found, correctly, that the ILLINOIS did not have a lookout properly stationed (Finding of Fact VI—Record 91). This was a serious and causative fault on the part of the ILLINOIS because no one informed the Captain of the maneuvers of the UNION STAR until the latter vessel was within 300 to 400 feet of the ILLINOIS (Tr 123:19-24). The UNION STAR was at that time reported to be moving at 2 to 3 knots (Tr 125:12-25; 126:1).

The last prior position of the UNION STAR that Captain Sorensen could recollect was a position three-tenths of a mile (1824 feet) away (Tr 115:7-10). There is a serious lack of watchfulness on the part of a vessel when another vessel in the near vicinity moves a distance equal to the length of five football fields without being observed and without the movement being reported to the navigator of the ILLINOIS. Failure to keep informed of the movements of the UNION STAR and commencing to depart from the pilot station without such information was a clear causative fault on the part of the ILLINOIS personnel. Had the Captain of the ILLINOIS been aware of the movements of the UNION STAR sooner and had

he considered them more clearly, it is probable that the collision would not have occurred. Captain Sorensen, had he considered the position and movement of the UNION STAR, would probably have delayed his move from the pilot station for another minute or two until the UNION STAR had passed upstream of his position. He would have waited because of his great concern about attempting to navigate the ILLINOIS south along departure range while facing astern to keep the range markers aligned.

Consequently, because Captain Sorensen did not receive any reports concerning the movements of the UNION STAR, he attempted a difficult maneuver in close proximity to the UNION STAR. Had the UNION STAR been allowed to pass by, Captain Sorensen's momentary confusion in his helm orders (see discussion under the heading *Explanation of the Navigation of the ILLINOIS* above) would have been an unimportant error which could have been easily corrected without threat to either vessel. However, since Captain Sorensen was unaware of the proximity of the UNION STAR, he attempted the maneuver when the latter vessel was close at hand. In this proximity, the effects of any slight error in movement are drastically more serious. Once the ILLINOIS started to move across the course of the UNION STAR, the collision was unavoidable.

The ILLINOIS was guilty of a serious causative fault in failing to provide Captain Sorensen with adequate information concerning the movements of vessels in the vicinity, both by failure to post a properly stationed and designated lookout and by the failure of the deck watch

of the ILLINOIS to keep watch of the movements of adjacent vessels and to report them to Captain Sorensen.

B. The Master of the ILLINOIS was guilty of a serious causative fault in attempting to perform a difficult maneuver in the close proximity of the UNION STAR.

As has been pointed out earlier (see discussion under the heading *Explanation of the Navigation of the ILLINOIS* above), the Master of the ILLINOIS, Captain Sorensen, was faced with a novel and difficult navigational task, i.e., to attempt to steer his ship down a range line marked by obscure range marks and bounded by wrecks and shoals on either side. In order to do this, he had to face astern[12] and give his commands while the ship moved forward. All of his commands had to be the reverse of the normal command for the situation.

He negligently attempted this difficult maneuver while the UNION STAR was in close proximity, moving slowly up the far east side of the channel.

The situation might best be analogized to attempting to back a large semi-trailer down a narrow alley by one who had previously only driven non-trailer trucks. The semi-trailer maneuvers in a somewhat similar way to that required of Captain Sorensen under these circumstances, i.e., the wheel must be put over in the opposite direction from that in which it is customarily put in a single chassis truck in order to turn. While one ought to get used to the

[12]When questioned about his position when he commenced his maneuvers, Captain Sorensen testified, in response to the question, "What direction were you facing?" "A. I was facing aft." "Q. Facing aft on the port wing of the bridge?" "A. Yes, that is, in other words, due north, due north." (Tr 122:13-17)

trick in short order, the first few movements might well be erroneous.

It would be clearly negligent for a novice on a semi-trailer to attempt to back it down a narrow street for the first time when another truck was coming up the other way. The prudent novice semi-trailer driver would wait for the other truck to pass before attempting this new and difficult task so that any errors of learning the technique would not hazard the safety of the vehicles.

We submit that it was a clear fault of judgment and an imprudent and negligent act on the part of Captain Sorensen to attempt to move the ILLINOIS onto the departure range line with the UNION STAR in close proximity.

C. The ILLINOIS was solely at fault in the collision in turning to the east, into the edge of the channel up which the UNION STAR was moving and crossing the course of the UNION STAR.

The noted American authority John Wheeler Griffin, in his definitive work *The American Law of Collision,* at 517 notes:

> "[T]here are certain maneuvers which, from their very nature, cannot be governed by the ordinary rules designed for vessels on courses. Thus a vessel leaving a slip, before she has got on course; a vessel backing out from a pier and turning to get her heading; a vessel in maneuvering in leaving an anchorage or in taking a pilot—all are cases of special circumstances because the movements necessarily vary in every case and cannot be brought under general rules. It is evident to approaching craft what the vessel is doing, and both she and they must take whatever

action is prudent under the circumstances to avoid collision."

In the case at bar, the special circumstances rule was applicable as to both vessels—one was maneuvering in leaving an anchorage and the other was dropping a pilot.

Speaking of a situation in which both vessels were subject to the special circumstances rule, it was said in *The Alaska* (S.D.N.Y. 1887), 33 Fed. 107, 111:

> "No peremptory or precise rule exists, which defines how the duty of mutual cooperation is to be fulfilled. The conduct of both vessels is to be governed by the exercise of such good care and judgment, with reference to the particular circumstances, as would be exercised by prudent and skillful navigators under like conditions."

Usages in particular localities must be considered in determining what action would be prudent under the special circumstances of the locality (Griffin, *The American Law of Collision,* 523). In the circumstances of the collision at bar, two usages are relevant in determining the prudence of the behavior of the vessels.

(1) The local usage, well known to navigators of the river, was that when the sea buoy off the Saigon River entrance was missing, the outgoing vessel would turn south after releasing her pilot and proceed along the previously discussed range line (Tr 207:5).

(2) It was also the custom for incoming vessels to get underway at slack water in order (a) to weigh anchor while the river current held their bows upstream and before the incoming flood tide swung them around to the south, making departure from anchorage upriver difficult in the narrow channel and (b) in order to proceed upriver on the flood tide (which was

particularly necessary for a heavily laden and slow vessel like the UNION STAR) (Tr 221:13).

In the instances where the Steering and Sailing Rules of the International Rules are superseded by special circumstances, each vessel must navigate in a manner which is safe and practicable under those circumstances in light of the local usages. Presumptively, it is safe and practicable to navigate on the starboard side. It is a general rule of admiralty apart from the precise dictates of the International Rules, that steam vessels approaching each other from generally opposite directions should, if necessary to avoid collision, put their helms over to cause them to move to starboard, and pass, port to port. *The Vanderbilt v. McKibbon* (1869) 73 U.S. (6 Wall.) 225, 230, 18 L. Ed. 823; *The Johnson v. McCord* (1870) 76 U.S. (9 Wall.) 146, 153, 19 L. Ed. 610. This is a general admiralty rule of prudence. It is the general rule to be followed in special circumstances in which it would be applicable. This rule was applicable to the circumstances surrounding the case at bar on August 26, 1960. The ILLINOIS was, by local custom as well as general prudential rules expected to direct her course southward from her position at the pilot station along the exit range. The UNION STAR, getting underway in accordance with local custom, to the east of the exit range, would have crossed the anticipated customary track of the ILLINOIS had the UNION STAR proceeded in any other direction than north-westward, as close to the eastern edge of the channel as possible and on a course which would pass upstream of the ILLINOIS' position. The UNION STAR thus took the customary and prudent course under the

circumstances. The UNION STAR kept to the far right (east) of the channel in order to pass, port to port. The ILLINOIS was expected to turn south from the pilot station and to stay on the range line. Instead, the ILLINOIS cut across the range line at almost a right angle and started to encroach upon the navigating area of the UNION STAR. The ILLINOIS was clearly at fault in so doing. The ILLINOIS neither followed the customary course nor remained on the prudential course which would cause it to pass the UNION STAR port to port.

The District Court erred in failing to find, on the basis of the evidence in this case, that the ILLINOIS was solely at fault.

V. THE LIBEL IS BARRED BY LACHES AND SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT.

The libel was filed by appellee on June 14, 1963, (R.1) twelve days short of two years, ten months from the date of the collision, which occurred on August 26, 1960. (Finding of Fact V, R.90-91).

The proper limitation period for damages arising out of a maritime collision is measured by laches. *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (9th Cir. 1934) 73 F.2d 200; *Ronda Cia. Maritima, S.A. v. MV DAGALI* (S.D.N.Y. 1964) 239 F.Supp. 447, 1964 A.M.C. 2118; Gilmore and Black, *Law of Admiralty* (1957) p.630.

In applying the equitable doctrine of laches, the court looks to the analogous limitation period of the forum had the action arisen at common law. Gilmore and Black, *Law of Admiralty*, 296n; *Wells v. Simonds Abrasive Co.* (1953) 345 U.S. 514, 517, 97 L.Ed. 1211, 1215; *Brown v.*

Kayler (9th Cir. 1959) 273 F.2d 588. In so doing the Federal court looks to the conflict of laws rule of the forum state and applies the state's "borrowing statute", if there is one. *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 85 L.Ed. 1477; *Ronda Cia. Maritima, S.A. v. MV DAGALI, supra.*

The State of California has a "borrowing statute" contained in Code of Civil Procedure § 361, which is applicable to this case and provides as follows:

> When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.

The parties have stipulated that the analogous period of limitations in Vietnamese law for filing an action for damages arising out of a ship collision is two years (Tr. 322:17-25) and appellee concedes tardy filing of the libel (Tr. 324:12-25)[13] Accordingly, the analogous limitation period for the District Court in this case was two years.

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[13]See also Finding of Fact XI (R. 92), which provides as follows:

> "Respondent China Union Lines conducted an investigation of the collision shortly after it occurred and in July of 1961 security arrangements in the form of letters of undertaking were exchanged between libelant and respondent, which were followed by discussions and negotiations between proctors for libelant and proctors for respondent. In the circumstances the court finds that respondent China Union Lines, Ltd., was not prejudiced by States Steamship Company's delay in filing its libel and that States Steamship Company was not guilty of laches."

The laches doctrine does not provide a mechanical application of the analogous forum limitation period. The fact that the applicable limitations period has expired, however, places upon libelant the burden of proving *both* that respondent has not been prejudiced by the delay in filing *and* that libelant had a legally justifiable excuse for its delay in filing:

> "Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury until the contrary is shown." *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (9th Cir. 1934) 73 F.2d 200, 203.[14]

The following cases in this circuit, a sample of many, confirm these dual burdens of a libelant, such as States Steamship Company herein, who files beyond the analogous statutory period.

> *Brown v. Kayler* (9th Cir. 1959) 273 F.2d 588.
>
> Analogous state limitation period—two years. Suit brought four years after accident with only excuse that libelant was unfamiliar with legal matters. Dismissed on grounds of laches.

> *Wilson v. Northwest Marine Iron Works* (9th Cir. 1954) 212 F.2d 510.
>
> Maritime personal injury suit brought five years after accident. Analogous state statute was two years. Dismissed on ground of laches because no facts negativ-

[14]This case was followed by the Ninth Circuit on this point in the non-maritime case of *Whitman v. Walt Disney Prod. Inc.* (9th Cir. 1958) 263 F.2d 229.

ing prejudice were proved by libelant and evidence of actual prejudice to respondent was presented.

Westfall Larson & Co. v. Allman-Hubble Tug Boat Co. (9th Cir. 1934) 73 F.2d 200.

Ship collision on December 27, 1929. Libel filed August 10, 1933. Analogous state statute of limitations was three years. Dismissed on grounds of laches.

Carslund v. United States (N.D.Cal. 1950) 88 F. Supp. 105.

Personal injury libel filed more than one year after the injury occurred. Dismissed on grounds of laches by Judge Harris with leave to amend to negative prejudice and give reason for delay.

Loraine v. Coastwise Lines (N.D. Cal. 1949) 86 F. Supp. 336, 338.

Personal injury occurred on March 10, 1943. Action commenced on March 6, 1946. Analogous state limitations period was one year. Prejudice to defendant found by reason of unavailability of certain witnesses and libel dismissed on grounds of laches.

A. Appellant was prejudiced by reason of the delay by appellee in filing the libel.

The record contains numerous examples of prejudice to appellant by reason of the delay by appellee in filing.

1. Events in Viet Nam between August 26, 1960, date of the collision, and filing the libel on June 14, 1963, should be judicially noticed by this court. The investigation by appellant was severely affected by the war, which increased in scope, during the intervening period.

2. The unavailability of the helmsman, the watch officer and another potentially important witness of the vessel ILLINOIS. (Tr. 100:20-101:15). On the issue of damages the principal witness for appellee was unavailable by reason of his death shortly before the trial (Tr. 192:5-12). In *Ronda Cia. Maritima, S.A. v. MV DAGALI* (S.D.N.Y. 1964) 239 F. Supp. 447, 1964 A.M.C. 2118, the court emphasized the serious prejudice to respondent by reason of absence of testimony of persons, such as the *helmsman*.

3. In order for appellant, a Chinese company, to defend the action it was necessary for it to present all of the testimony of its officers and other witnesses, who are Chinese, by depositions taken several years after the event by reason of the delay of appellee in prosecuting the suit. As a result, the witnesses were, as in the case of *Wilson v. Northwest Marine Iron Works* (9th Cir. 1954) 212 F.2d 510, "hazy, vague and unclear" on several important points in issue. Because of the passage of time the Master of appellant's vessel UNION STAR, for example, testified in New York City at his deposition on June 19, 1964, without having the vessel's deck log book available to him, a most important and significant handicap to appellant's case. (Tr. 225-254; 259-286).

Appellant respectfully submits that the equitable presumption of prejudice to it by reason of the delay in filing the libel has clearly not been overcome by appellee.

B. There is no legal excuse for the delay by appellee in filing the libel and no evidence of an excuse was introduced.

When appellee amended its libel after its case had been concluded, the amendment made no allegation whatsoever

that appellee had an excuse for the delay. (Amendment to Libel, R.82-83). The record contains absolutely no evidence resembling an excuse by appellee for its admitted delay in filing the libel. The fact that security arrangements were exchanged by the parties (Tr. 330:14-20) is not evidence of an "excuse" for the delay in filing (although appellee apparently would have the court believe that it was) but rather is evidence that appellee was aware of the potential litigation and simply failed to act. Letters of undertaking were exchanged in the *MV DAGALI* case (S.D.N.Y. 1964) 239 F.Supp. 447, 1964 A.M.C. 2118, and this was specifically found by the court not to be evidence of a legally sufficient excuse for the delay in filing. See also *White v. United States Lines Co.* (D.Md. 1966) 254 F.Supp. 480.

The record in this case strongly supports appellant's defense of laches. Unfortunately the trial court concluded in the opening moments of trial that it did not favor a laches defense regardless of the evidence, and this defense obviously received no consideration.[15]

Apparently relying upon the trial court's disinterest in the laches defense, appellee made no effort whatsoever to present evidence to refute the defense of laches until after its case had closed, when its counsel conceded that

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[15]The Court: When did you first take affirmative action with respect to your claim, the counterclaim and cross-libel?

. . .

Mr. Gillmar: It was almost concurrent.
The Court: Concurrent?
Mr. Gillmar: Just about.
Mr. Phillips: Of course, there is no question, Your Honor, that we knew about the matter when it occurred.
The Court: I'm not impressed by the latches, [sic.] Counsel. Let's pass that. (Tr. 16:15-17:2)

he had introduced no evidence on the point, that he had been under the incorrect belief that a three year limitations period would apply and sought permission of the court to reopen its case to attempt to rectify the deficiency in the record (Tr. 324:12-15). Appellant disputes that appellee properly introduced a single item of evidence relevant or admissible to refute the defense of laches. Appellee made statements in the record entirely unsupported by admissible evidence. (Tr. 329:18-334:15). Even conceding arguendo that what was presented by appellee constituted admissible evidence on the subject, no evidence relevant to legal excuse was introduced and appellee conceded that there was no waiver by appellant of the defense of laches. (Tr. 334:8-11).[16]

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[16]Were there such a contention California Code of Civil Procedure § 360.5 would be applicable and the requirement that there be a written waiver by appellant would be unsatisfied. Section 360.5 provides:

> No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated. No waiver executed prior to the expiration of the time limited for the commencement of the action by this title shall be effective for a period exceeding four years from the date of expiration of the time limited for commencement of the action by this title and no waiver executed after the expiration of such time shall be effective for a period exceeding four years from the date thereof, but any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver. Such waivers may be made successively. The provisions of this section shall not be applicable to any acknowledgment, promise or any form of waiver which is in writing and signed by the person obligated and given to any county to secure repayment of indigent aid or the repayment of moneys fraudulently or illegally obtained from the county.

VI. APPELLANT CANNOT BE HELD LIABLE FOR REPAIR COSTS TO APPELLEE'S VESSEL ILLINOIS GREATER THAN THE LOWEST COST OF REPAIRS AVAILABLE IN THE ORIENT.

The District Court awarded appellee the full $40,053.60 repair bill of Puget Sound Bridge & Drydock Company[17] (Finding of Fact X, R.92; Stipulation Re Damages, States Steamship Company, Item 9, R.85). Appellant offered to present testimony of appellee's own surveyor, Walter S. Martignoni, that repairs could have been accomplished in Japan, for example, at the time of the collision, for $17,222 (Tr. 298:7-299:1). Mr. John V. Walsh, a qualified consulting engineer and ship surveyor, was called as a witness by appellant and an offer of proof was made that repair costs for the ILLINOIS not ex-

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[17]The details of this bill are found in Res. Exhibit O, p. 10 as follows:

Puget Sound Bridge & Drydock Company		
Damage Repairs Bid (straight time)		$29,428.00
Bonus Overtime		4,710.00
Additional damage repair work items		1,260.00
Drydocking charges for vessel and cargo:		
1½ days for vessel	$2788.60	
1½ days for cargo	1022.00	
Facilities on dock	465.00	
Towboats on and off dock	940.00	
Pilot fee shifting vessel	120.00	
		5,335.00
		$40,733.60
Credits:		
Cancel insert No. 5 'tween deck aft bulkhead (Item 31-g)	120.00	
Cancel "Dimetcote" (Item 32)	560.00	
		-680.00
	TOTAL	$40,053.60

ceeding $15,000 could have been obtained in the Orient by a reasonable shipowner (Tr. 305:3-306:8). Appellee's objection to Mr. Walsh's testimony was sustained by the trial court on the ground of "irrelevance." (Tr. 306:5-8)

A. The injured party must do everything reasonable to minimize its damages.

It is a universally accepted principle of tort law that an injured party has an obligation not to exaggerate or inflame his damages, but, on the contrary, must do everything which may be reasonably expected of him to minimize his damages. The matter is summarized in the American Law Institute, *Restatement of Torts* § 918 as follows:

> *Section 918. Avoidable Consequences*
>
> (1) Except as stated in subsection (2), a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.
>
> (2) A person is not prevented from recovering damages for a particular harm resulting from a tort if the tort feasor intended such harm or adverted to it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of such harm intentionally or heedlessly failed to protect his own interests.

McCormick, *The Law of Damages* 130, concludes that the injured party is under a disability to recover damages which have been increased due to his failure to take active steps to minimize his loss. Sedgwick confirms [1 Sedgwick, *Damages* §225 (1912)] that the claimant may

not recover for an avoidable loss. See also 25 C.J.S., *Damages* §§ 71, 91.

B. Exclusion of evidence by the trial court of repair costs available in the Orient at the time of the collision was reversible error.

The admiralty courts universally require that an injured party mitigate its damages. *Kossick v. United Fruit Co.* (1961) 365 U.S. 731, 737, 6 L.Ed.2d 56; see Roscoe, *The Measure of Damages in Actions of Maritime Collisions* 50. For this reason it has been held that a vessel must have its repair accomplished in the port providing the least expensive competent repairs. *Navigazione Libera T.S.A. v. Newton Creek Towing Co.* (2d Cir. 1938) 98 F. 2d 694, 697, 1938 A.M.C. 1419, 1423.

Following are decisions illustrating judicial application in admiralty of the requirement of mitigation of damages, all confirming that the trial court committed reversible error in excluding the testimony of John V. Walsh on grounds that it was "irrelevant."

Zeller Marine Corp. v. Nessa Corp. (2d Cir. 1948) 166 F.2d 32, 1948 A.M.C. 418.

A scow was damaged when a lift of girders fell to its deck. After findings by a Commissioner, the Court reviewed the question of whether the vessel need be restored "as good as new" by replacement of certain equipment or simply repaired so as to restore its market value without damaging its use. Judge Augustus Hand in ruling that the lesser repair cost was the proper item of damages concluded: "Any award must be calculated with recognition of the customary obligation of the injured party to minimize damages." (at p. 34).

The F. J. Luckenbach (E.D. Pa. 1929) 42 F.2d 279. The court in reviewing exceptions to a commissioner's report concluded: "There is another principle of the law common to the law maritime and common law. This is that the injured party may not exaggerate or inflame his damages, but, on the contrary, must do everything which may be reasonably expected of him to minimize his damages." (at p. 280).

Carolinian—San Clemente (N.D.Cal. 1943) 1943 A.M.C. 758.

Judge Goodman confirmed that the right of recovery may be defeated altogether if a shipowner fails to take proper steps to mitigate or reduce his damages.

Atkins v. Alabama Drydock & Shipbuilding Co. (S.D.Ala. 1961) 195 F.Supp. 944, 1961 A.M.C. 909.

The court disallowed certain repair expenses claimed by the shipowner on the grounds that there was no evidence that they were either necessary or reasonable to restore the vessel to its pre-collision condition.

Judicial application of the recognized duty of the injured party to mitigate damages recognizes the international character of shipping by finding that a shipowner may only recover the actual costs of repair or replacement parts if obtained in an available world port in which the price is lowest. In *Navigazione Libera T.S.A. v. Newtown Creek Towing Co.* (2d Cir. 1938) 98 F.2d 694, 1938 A.M.C. 1419, the court held that the shipowner was required to buy a replacement propeller where the market cost was lowest, Trieste and not New York.

Appellant respectfully submits that the trial court's ruling that the testimony offered by appellant on the reasonableness of the repair costs of appellee was "irrelevant" was clearly erroneous and should be reversed with directions that appellee is entitled to include in its damages only the lowest repair costs reasonably available.

C. The definition of the required standard of conduct by the shipowner in mitigating its damages is a question of law proper for review in this appeal.

In numerous cases, the admiralty courts have held that the definition of the required standard of conduct of an injured party in mitigating its damages is a question of law. See *Ellerman Lines v. The PRESIDENT HARDING* (2d Cir. 1961) 288 F.2d 288, 291-292, citing numerous decisions in support of this proposition.

D. The costs of repair to appellee's vessel Illinois incurred at the Puget Sound Bridge and Drydock Co. were unreasonable and should be stricken from appellee's damages.

In the trial court appellant disputed the reasonableness of the Puget Sound Bridge & Drydock Company repair bill. (Stipulation of Damages, R.85:22-26). Appellant offered expert testimony challenging the reasonableness of appellee's cost of repair. (Tr. 298-299, 305-306). As concluded in *The Cape Friendship* (D.Md. 1951) 100 F.Supp. 856, 1951 A.M.C. 1952, 1958, ". . . the burden of proving damages in all cases rests upon the party claiming to have sustained them, and it is the duty of the shipowner to take all reasonable actions to minimize the damages." (p.860) (Citing numerous decisions).

Appellee did not offer any testimony or evidence to sustain its burden of proof that the challenged repair cost item of damages was in fact reasonable, and this item of damages should therefore be stricken as a matter of law by this court from appellee's damages. *Carolinian—San Clemente* (N.D.Cal. 1943) 1943 A.M.C. 758.

VII. APPELLEE'S SUBSIDY CONTRACT WITH THE UNITED STATES GOVERNMENT IS NOT A DEFENSE TO APPELLEE'S FAILURE TO MINIMIZE ITS DAMAGES.

The District Court found that:

> "At all relevant times the SS ILLINOIS was being operated by libelant States Steamship Company under the terms of an operating differential subsidy contract with the United States Government, the terms of which required that the ILLINOIS collision repairs be effected in a shipyard in the United States." (Finding of Fact IX, R.92).

Appellee made no effort to refute appellant's contention that the repair cost of the ILLINOIS incurred at the Puget Sound Bridge & Drydock Company (Stipulation Re Damages, States Steamship Co., Item 9, R.85) was unreasonable and that appellee had failed to mitigate its damages. In response its sole defense was that its subsidy contract with the United States Government "required" that it repair its vessel in the United States. (Tr. 194:1-15; 195:15-25; 303:12; 304:25).

A. Neither appellee's subsidy contract nor the law of the United States required appellee to repair its vessel within the United States.

Title 46 United States Code § 1176 provides in pertinent part as follows:

> (7) that whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States, as defined in section 1155 of this title, except when it is necessary to purchase supplies and equipment outside the United States to enable such vessel to continue and complete her voyage, and the operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an *emergency*. [Emphasis added]

Relevant sections of appellee's subsidy contract (Respondent's Exhibit R, 160:102 and 160:104-105) provide as follows:

> Section II-4. *Use of United States goods.*
> Whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States, as defined in section 505(a) of the Act, except when it is necessary to purchase supplies and equipment outside the United States to enable any subsidized vessel to continue and complete her voyage; and the Operator shall perform repairs to any such vessel within the continental limits of the United States, except in an emergency.
>
> . . .
>
> Section II-6. *Maintenance and Repairs.*
>
> (a) During the term of this agreement, the operator shall maintain each vessel and her machinery,

boilers, appurtenances, and spare parts in good order and condition and at all times maintain each vessel with full unexpired classification and other required certificates. With express permission of the United States, the operator may allow such classification certificates to expire during any idle or inactive period. Pursuant to the Rules and Regulations of the United States as from time to time amended the operator shall give due notice of the making of repairs or replacements in the United States, and shall afford United States adequate opportunity fully to inspect the items to be repaired and the proposed replacements. The United States shall cause such inspection to be made promptly in order to avoid undue delay in the sailing of any vessel. The United States may take such action as it deems advisable to ascertain that all repairs or replacements have been accomplished as specified. In making repairs, the operator shall use due diligence to minimize expense and shall comply with all rules and regulations, with respect to competitive bidding or other procedure, which the United States has adopted or may hereafter adopt in connection therewith.

The wording of the statute and the contract contemplate that repairs be accomplished outside the United States in cases of "emergency", and also that the expense in connection with repairs at all times be minimized.[18] It is hard to think of any clearer "emergency" than repairs after a ship collision.

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[18]Contract Section II-6 provides in part:

"In making repairs, the operator shall use due diligence to minimize expense and shall comply with all rules and regulations with respect to competitive bidding or other procedure which the United States has adopted or may hereafter adopt in connection therewith."

B. The legislative history of section 1176(7) of Title 46 United States Code does not support appellee's contention that it was "required" to repair in the United States.

Subpart (7) of section 1176 of the Merchant Marine Act of 1936 [46 U.S.C. § 1176] provides:

> (7) That whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States as defined in section 1155 of this title, *except when it is necessary to purchase supplies and equipment outside the United States to enable such vessel to continue and complete her voyage,* and the operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an *emergency.* [Emphasis added]

No part of the Congressional debate or hearings on this section supports appellee's contention in the trial court that the ship subsidy law *bound* appellee to repair its vessel in the United States *regardless of cost.* The legislation, it is true, was intended to protect American labor by subsidizing 75% of the expenses of American operators over foreign expenses wherever practicable so that vessel construction and repairs would ordinarily be performed in the United States but it was recognized that "emergency" circumstances would justify repairs outside of the United States or the legislation would be self-defeating:

> "There are many instances where, in a foreign land, or even here, there would be facilities for the repair of subsidized vessels, and it might happen that an independent concern, a small owner, might wish to make use of those facilities. If there are any profits, they are all used anyway in liquidating the loan on

the debt or the advances made to the subsidized ships; but our thought in formulating the language was that these facilities ought to be used by anybody who cared to make use of them."

Remarks of Mr. Copeland. 80 Cong.Rec. 1069 (1936)

C. Even if Title 46 United States Code § 1176(7) or appellee's subsidy contract required appellee to repair its vessel in the United States, appellant cannot be held to respond in damages for greater repair costs than were available in the Orient.

Although it is correct that under certain circumstances, the injured party cannot be held to act to mitigate his damages in violation of his contractual duties to a third person, it is equally true that an alleged wrongdoer, such as appellant, cannot be held to the consequences of greater damages as a result of the injured party's voluntary act, such as entering into a subsidy contract. Appellee's situation is comparable to the time charterer who had no right to recover from a drydock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during the semiannual drydocking required by the charter party. In that case, Mr. Justice Holmes ruled that:

". . . a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, 309, 72 L.Ed. 290, 292.

The position of appellant is comparable to the alleged wrongdoer in the case of *Hadley v. Baxendale,* 9 Ex. 341,

156 Eng. Rept. 145 (1854), in which the Court of Exchequer found that the breaching party could not be held to damages beyond the reasonable contemplation of the parties upon entering into a contract. There is, of course, no contractual relationship between the parties here but, as the Supreme Court has emphasized, the full scope of the admiralty rule of damages must prevail over contrary provision and the absence of a contractual relationship between the parties is not conclusive. *Weyerhaeuser S.S. Co. v. United States* (1963) 372 U.S. 597, 603, 10 L. Ed.2d 1, 6. That principle should apply herein to exclude the excessive damage repair costs of appellee.

D. If appellee is permitted damages based upon repair costs incurred in the United States rather than lower costs available in the Orient by reason of its subsidy contract with the government of the United States, the Constitution of the United States and the Treaty of Friendship, Commerce and Navigation between the United States of America and China will be violated.

The Constitution of the United States provides that treaties entered into by the United States Government are the supreme law of the land. *Constitution of the United States,* Article VI, clause 2. Treaties entered into after the enactment of a Congressional Act, such as the Merchant Marine Act of 1936 (46 U.S.C.A. § 1171 *et seq.*), upon which appellee relied below in arguing it was bound to repair in the United States (Tr. 193:10-15; 195:15-18) was therefore superseded, to the extent inconsistent, by the Treaty of Friendship, Commerce and Navigation with the Republic of China, November 4, 1946 [November 30, 1948] T.I.A.S. No. 1871; *Cook v. United States,* 288 U.S.

102, 118, 77 L.Ed. 641, 649 (1933). That treaty provides for national treatment for all Chinese vessels, as follows:

> "The vessels and cargoes of either High Contracting Party shall, within the ports, places and waters of the other High Contracting Party, in all respects be accorded treatment no less favorable than the treatment accorded to the vessels and cargoes of such other High Contracting Party, irrespective of the port of departure or the port of destination of the vessel, and irrespective of the origin or the destination of the cargo." Article XXII, para. 1

The Merchant Marine Act of 1936 provides subsidies for qualifying American vessels in return for the owners compliance with certain conditions. See 46 U.S.C.A. §§ 1171-1182. The subsidies were available to the ILLINOIS, but of course not available to the UNION STAR, a Republic of China vessel (Finding of Fact II, R.89). Under the terms of the treaty the UNION STAR should not therefore be held to respond in damages for the exorbitant cost of repairs to the ILLINOIS incurred by repairing in an American shipyard if the court should find that such repair was necessitated by appellee's contract and the Merchant Marine Act of 1936.

VIII. COST OF DRYDOCKING THE VESSEL ILLINOIS SHOULD BE DEDUCTED FROM THE DAMAGES ALLOWED APPELLEE.

Appellee's repair bill at Puget Sound Bridge & Drydock Co. (contained in Stipulation of Damages, States Steamship Co., Item 9, R.85) includes costs of drydocking

the vessel in the sum of $5335.00.[19] This item was included by the court in the damages divided between the vessels. [Findings of Fact X, R.92 pursuant to Stipulation Re Damages R.85].

Appellant presented testimony of expert witness John V. Walsh disputing the necessity of drydocking the vessel (Tr. 308:2; 312:23; 317:2-19) to accomplish the repairs. Mr. Walsh testified that location of the damage to the hull was such that with a minimum of ballast the necessary repairs could have been safely accomplished without the necessity of the exorbitant drydocking expense (Tr. 310:23; 312:13). He testified that approximately 25% of the repairs that were accomplished at the time of drydocking (set forth in Respondent's Exhibit "O") were unrelated to those arising from this collision (Tr. 317:20; 318:2) and concluded that drydocking might easily have been necessary by reason of repairs or maintenance unrelated to collision damages.

Appellee offered no rebuttal testimony to justify its claim of necessity in drydocking its vessel and appellant has disputed the reasonableness in all respects of the Puget Sound Bridge & Drydock Co. bill (R.85:22-26). The burden of proving the reasonableness of its vessel repair

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[19]The following items of the bill relate to drydocking:

Drydocking charges for vessel and cargo:	
1½ days for vessel	$2788.60
1½ days for cargo	1022.00
Facilities on dock	465.00
Towboats on and off dock	940.00
Pilot fee shifting vessel	120.00
	$5,335.00

Respondent's Exhibit O, p. 10.

costs rested on appellee. *The Cape Friendship* (D.Md. 1951) 100 F.Supp. 856, 1951 A.M.C. 1952, 1958; *Atkins v. Alabama Drydock & Shipbuilding Co.* (S.D. Ala. 1961), 195 F.Supp. 944, 1961 A.M.C. 909. Appellee's failure to sustain this burden should result in loss of the cost of drydocking from the allowable damages and the decree of the District Court should be so revised. *Carolinian-San Clemente* (N.D. Cal. 1943) 1943 A.M.C. 758.

CONCLUSION

For the foregoing reasons and upon the entire record, we respectfully submit that the District Court plainly erred and that the decree of the District Court should be stricken and the Libel dismissed or in the alternative this Court should modify the decree of the District Court so as to hold the ILLINOIS solely to blame for the collision and resulting damage and to exonerate the UNION STAR from all liability or in the alternative modify the Decree by striking the ILLINOIS repair cost of $40,053.60 or its drydocking cost of $5,335.00.

Dated, San Francisco, California,
September 28, 1966.

Respectfully submitted,

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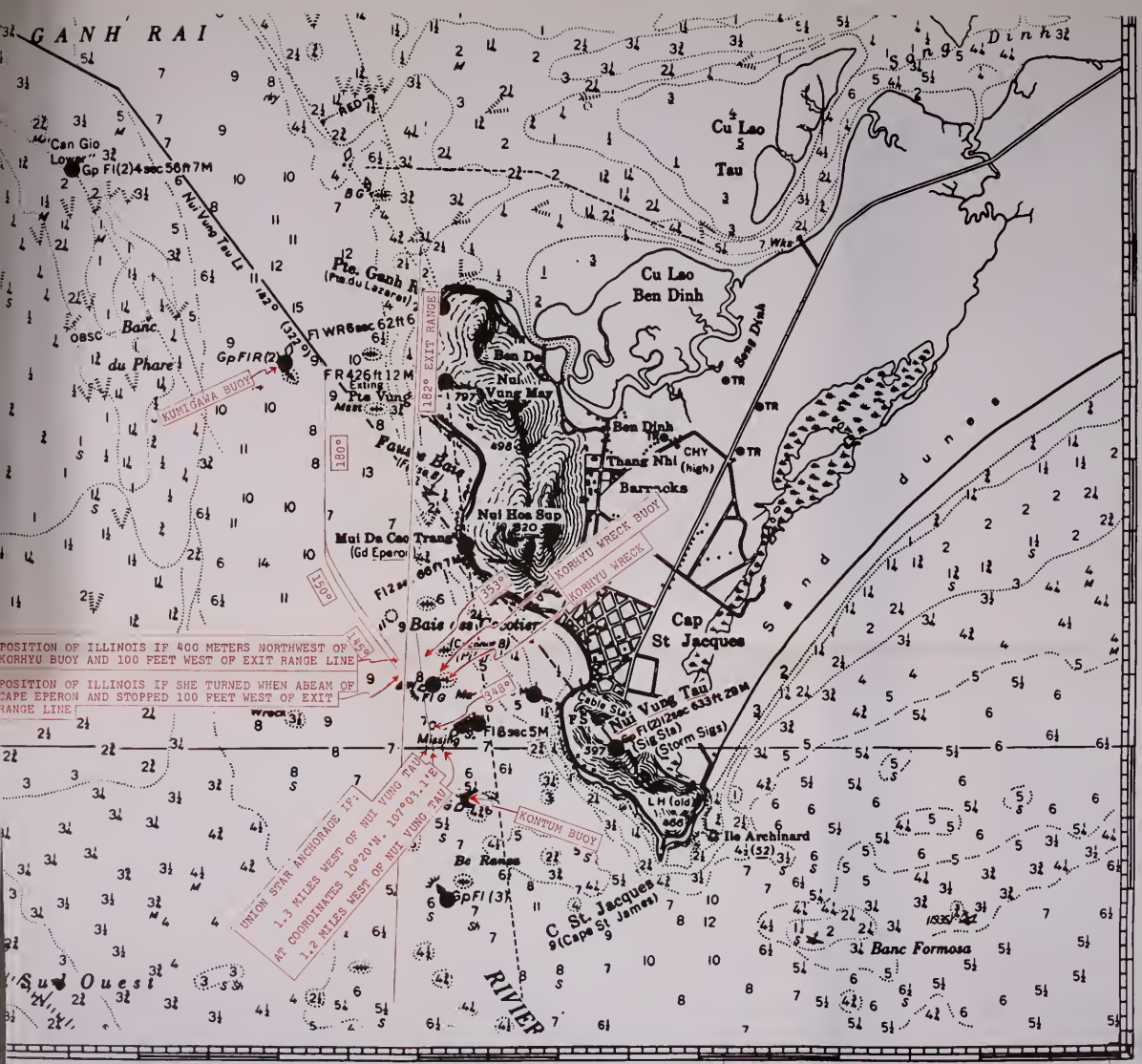
CERTIFICATE UNDER RULE 18

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By STANLEY F. GILLMAR
Of Attorneys for Appellant
China Union Lines

(Appendices Follow)

Appendices.



PORTION OF H.O. 3150 (2nd Ed.) RIVIERE DE SAIGON
Soundings in Fathoms - Original Scale 1:75,000

CORRECTED THROUGH NOTICE TO MARINERS NO. 35 AND CERTIFIED BY THE U.S. NAVY HYDROGRAPHIC OFFICE TO BE THE CHART EFFECTIVE ON AUGUST 26, 1960